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No. 97-____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NORTHEAST CELLULAR TELEPHONE COMPANY, L.P.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), the separation of powers inherent in Article III of the U.S. Constitution protects judicial judgments remanding a case to a lower tribunal for disposition in accordance with the law as declared by the higher court against *post hoc* legislative invalidation.

2. Whether the court of appeals correctly determined that the Paperwork Reduction Act Amendments of 1995, 44 U.S.C. § 3512(b), override 47 U.S.C. §§ 402(h), 405(a) and, notwithstanding *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), could be applied to revive a claim that was held to have been waived under prior law and required the Federal Communications Commission to rescind a cellular license awarded years before to a competing applicant.

STATEMENT REQUIRED BY RULE 29.6

Petitioner Northeast Cellular Telephone Company, L.P. ("Northeast") is a limited partnership comprised of a general partner, Maine State Cellular Telephone Co. ("MSCTC"), and two limited partners, Pine Tree Technology ("Pine Tree") and USCOC of Portland, Inc. ("USCOC-P"). Northeast has no subsidiaries.

MSCTC, which holds a 1% ownership interest in Northeast, is owned by PT and USCOC-P. MSCTC has no subsidiaries.

Pine Tree has a controlling interest (50.49%) in Northeast. Pine Tree is a closely held corporation controlled by Timothy D. Hutchison, and has no subsidiaries.

USCOC-P is a wholly owned subsidiary of United States Cellular Operating Co. ("USCOC") and holds a 48.51% ownership interest in Northeast. USCOC is a wholly owned subsidiary of United States Cellular Corp. ("USCC"). USCC is a publicly traded, non-wholly owned subsidiary of Telephone and Data Systems, Inc., which is also a publicly traded corporation. USCOC-P has no subsidiaries.

PARTIES

Northeast Cellular Telephone Company, L.P. is the petitioner in this case.

The respondents in this case are the Federal Communications Commission and Portland Cellular Partnership, intervenor below. In addition, Saco River Cellular, Inc., appellant and intervenor below, is named as a respondent pursuant to this Court's Rule 12.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Northeast Cellular Telephone Company, L.P. ("Northeast") respectfully requests that a writ of certiorari issue to review the decision of the court of appeals in this matter, which has been stayed pending certiorari.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit is reported at 133 F.3d 25, and is reproduced in the Appendix to this Petition for Certiorari ("Pet. App."), beginning at page 1a. The unpublished orders of the court of appeals staying its judgment pending certiorari over respondents' objections and denying rehearing of its decision on the merits appear at pages 18a and 20a of the Appendix, respectively. The decision of the Federal Communications Commission ("FCC"), retroactively rescinding petitioner's cellular telephone license and granting, *nunc pro tunc,* the competing applica-

tion of Portland Cellular Partnership ("PortCell"), is published at 11 FCC Rcd. 19997, and appears at Pet. App. 24a.

JURISDICTIONAL STATEMENT

The court of appeals entered its opinion and judgment on January 16, 1998. The court denied petitioner's timely petition for rehearing and suggestion for rehearing *en banc* on March 19, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of law involved in this case are reproduced in the Constitutional and Statutory Appendix hereto, beginning at Pet. App. 48a.

STATEMENT OF THE CASE

This case presents the Court with a direct challenge to federal judicial autonomy and to the weighty interest of individual citizens in not having their rights and obligations altered by retroactive legislation. The legal issues could not be more poignantly posed than here, where one litigant, Northeast, won its case in the D.C. Circuit with a definitive ruling that the application of its opponent, PortCell, for the cellular license for Portland, Maine, had to be dismissed because of PortCell's unquestioned failure to comply with the requirements of federal law promulgated by the FCC. Northeast then received the license from the FCC, and twice the FCC rejected PortCell's untimely efforts to circumvent the D.C. Circuit's judgment under existing law. Northeast built and continuously operated this system until PortCell succeeded in smuggling seemingly innocuous language into the Paperwork Reduction Act in 1995. The effect of the new legislation, under the holding below, was to permit PortCell to sweep aside the D.C. Circuit's prior judgment and the subsequent FCC orders complying with that judgment. Consequently, Northeast's license has been stripped away and awarded to PortCell, based solely on the 1995 legislation.

It would be difficult to find a case that better illustrates why retroactive application of new statutes is so disfavored under our Constitution and the American legal tradition. The rule against retroactivity embodies a profound hostility to providing "special opportunities for the powerful to obtain special and improper legislative benefits." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 267 n.20 (1994) (citing *The Federalist No. 44*, at 301 (James Madison) (J. Cooke ed. 1961)). Similarly, the unfair ability of politically powerful parties to secure "legislative interference with [adverse] private judgments of the courts" led the Framers "to separate the legislative from the judicial power." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 221 (1995). Both of these concerns are squarely implicated here, for PortCell has obtained from Congress *post hoc* legislation extending to it a valuable benefit—a cellular telephone license—to which it not only was not entitled under prior law, but had been denied in compliance with an undisturbed judgment of the D.C. Circuit. Moreover, the court below has undermined the independence of the federal judiciary by giving Congress free rein, in violation of the separation of powers embodied in Article III, to revise nonconstitutional judicial decisions that result in a remand to a lower tribunal. Accordingly, this case provides an ideal vehicle for the Court to decide the important and recurring questions of law presented herein.

Procedural Background

1. In May 1986, the Federal Communications Commission conducted a lottery to determine which of five applicants would be awarded the right to construct and operate a cellular telephone system for Block B in Portland, Maine. On June 24, 1986, the FCC named Portland Cellular Partnership ("PortCell"), a general partnership consisting of three of the five applicants, including NYNEX (one of the giant regional Bell Operating Companies and a Fortune 100 corporation), as the "tentative selectee," ahead of Saco River Cellular, Inc. and Northeast. This meant that if PortCell was found to have met the various

legal requirements for receipt of a license, its application would be granted, and the other applications denied.

According to Congress and the FCC, one essential prerequisite to receipt of a license is a "firm financial commitment." Under then-Section 22.917(b)(1) of the Commission's rules, PortCell was required to "obtain a firm financial commitment for the financing necessary to construct and operate for one year its proposed cellular system." 47 C.F.R. § 22.917(b)(1) (1986); see also 47 U.S.C. § 308(b) (applicants "shall" set forth their financial qualifications). Well before the Portland lottery was conducted, the FCC had clearly delineated what was necessary to satisfy the financial commitment requirement. Among other things, an applicant relying on a letter of credit had to reach agreement on the terms and conditions of the prospective loan. 47 C.F.R. § 22.917(b)(1)(i) (1986).

Ignoring Justice Holmes' sage admonition that "[m]en must turn square corners when they deal with the Government," *Rock Island, Ark. & La. R.R.* v. *United States,* 254 U.S. 141, 143 (1920), PortCell presented only a single letter from NYNEX Credit Company, which plainly demonstrated that PortCell had not satisfied the financial qualifications requirement. See *Portland Cellular Partnership*, 4 FCC Rcd. 2050, 2050-51 (1989) (ruling that PortCell's financial qualification showing was "defective" in two respects). Incredibly, however, the Commission, on its own motion, waived the firm financial commitment requirement long deemed necessary by the FCC to promote the public interest, and affirmed the grant of PortCell's application, based solely on the FCC's "lengthly [sic] experience in dealing with NYNEX Corporation and its various subsidiaries and affiliates." *Id.* at 2051. Northeast appealed.

In 1990, the D.C. Circuit vacated the Commission's "outrageous" decision as "arbitrary and capricious," and thus violative of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *Northeast Cellular Tel. Co.* v. *FCC*, 897 F.2d 1164, 1167 (D.C. Cir. 1990). Noting

that "[t]here is no question here that Port Cell has failed to comply strictly with [the FCC's financial commitment] regulations" (*id.* at 1166), the court ruled that the Commission's decision was unlawful because it "was not based on any rational waiver policy" and that, "given the record in this case, we cannot imagine any standard that would have justified a waiver of the filing of PortCell's financial qualifications." *Id.* at 1165. In remanding the case, the court unequivocally instructed the Commission that unless the record then in existence contained certain specified information pertaining to NYNEX's credit practices, which it is undisputed that the existing record did not contain, "the FCC *must* disqualify Port Cell's application." *Id.* at 1167 (emphasis added).

The FCC and PortCell could have sought certiorari in this Court, but neither did so. As such, they necessarily elected to acquiesce in the panel's decision. This decision accordingly became final 90 days later when the time for seeking certiorari expired. See 28 U.S.C. § 2101(c); see also 47 U.S.C. § 402(j). Because the FCC and PortCell had acquiesced in the court of appeals' unquestionably correct ruling that agencies cannot arbitrarily waive stated requirements as to favored parties while holding other parties to those requirements, the case was then returned to the Commission, which was statutorily required promptly to dispose of the case in accordance with the law declared in *Northeast*. See 47 U.S.C. § 402(h) (on remand from a reviewing court "it shall be the duty of the Commission" to "carry out the judgment of the court," and to do so "forthwith").

On remand, the Commission confirmed the obvious—that its prior waiver could not be justified on the existing record except as a preferential accommodation for politically powerful NYNEX—and therefore dismissed PortCell's application as directed by *Northeast*. *Portland Cellular Partnership*, 6 FCC Rcd. 2283 (1991). Accordingly, having dismissed both PortCell and (on unrelated grounds) Saco River (*id.* at 2284), the Commission

designated Northeast, controlled by a small, closely held independent telephone company and its principal, Timothy D. Hutchison, as the tentative selectee for the Portland license. See *id.* at 2285 n.8.

One year later, on April 29, 1992, PortCell filed an untimely petition for reconsideration, asking the Commission to reinstate its license. See 47 U.S.C. § 405(a) (petitions for reconsideration of a FCC order must be filed within 30 days). There, for the first time in this entire proceeding, PortCell challenged the financial qualifications rule and the dismissal of its application a year earlier as violative of the Paperwork Reduction Act, 44 U.S.C. §§ 3501 *et seq.* ("PRA"). The PRA precludes federal agencies from "conduct[ing] or support[ing] the collection of information" from private parties unless prior approval has been obtained from the Office of Management and Budget ("OMB"). *Id.* § 3507(a). "Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with" an unauthorized collection of information. *Id.* § 3512(a). PortCell argued that because the Commission lacked OMB approval for the firm financial commitment rule in 1986, it could not disqualify PortCell based on its undisputed failure to comply with the rule, even though the substantive rule had been approved by OMB in March 1990, one year before the rule was ultimately applied to PortCell.

Observing that PortCell's petition for reconsideration was filed "nearly a year after the 30-day deadline for such petitions set forth in Section 405 of the Communications Act," the Commission—albeit after a wholly unjustifiable delay that was flatly inconsistent with Section 402(h)'s command that the Commission must act "forthwith" on remand from a reviewing court, 47 U.S.C. § 402(h)—denied PortCell's petition for reconsideration in 1993. *Portland Cellular Partnership*, 8 FCC Rcd. 4146, 4146 n.4 (1993). In that order, the Commission also granted Northeast's application. *Id.* at 4152. Amazingly, PortCell yet again sought reconsideration, frivolously challenging

the financial qualifications rule on the same PRA grounds that the Commission had properly rejected under Section 405(a) as untimely. As before, the Commission refused to entertain that untimely claim, acknowledging that PortCell's request "conflict[ed] with the [D.C. Circuit's] instruction in *Northeast Cellular*." *Portland Cellular Partnership*, 9 FCC Rcd. 3291, 3292 n.3 (1994).

In compliance with the requirement to begin service that was embodied in the Commission's ruling, Mr. Hutchison and Northeast constructed a state-of-the-art cellular telephone system in Portland at a cost in excess of $10 million. Mr. Hutchison and Northeast have served the Portland cellular market ever since, now providing more than 15,000 subscribers with the high quality service that Northeast (and Northeast alone) had proven itself financially and otherwise qualified to provide in accordance with FCC rules. Northeast continues, even to this day, to upgrade that system at substantial effort and expense to meet growing demand and to ensure continued first-rate service to its subscribers.

In taking all of these steps, Mr. Hutchison and Northeast acted secure in the knowledge that, based on a variety of undisturbed rulings in this proceeding, PortCell's application for the Portland license was no longer in contention. These were: (1) the court of appeals' 1990 ruling in *Northeast* that "the FCC must disqualify Port Cell's application" unless a waiver of the financial qualifications requirement could be justified on the prior record, a possibility the court itself "could not imagine" (897 F.2d at 1167); (2) the FCC's undisputed 1991 ruling on remand from *Northeast* that the prior waiver granted to PortCell could not be so justified and that *Northeast* thus compelled dismissal of PortCell's application, 6 FCC Rcd. at 2284; and (3) the FCC's two subsequent rulings that PortCell's belated PRA challenges to the dismissal of its application were waived because they had not been raised within Section 405(a)'s 30-day period for seeking reconsideration of FCC orders. 9 FCC Rcd. at 3291 (1994); 8

FCC Rcd. at 4146 n.4 (1993). The basic question presented by this case, therefore, is whether Congress could, after the fact, sweep all of these rulings aside and throw out of business a party who, at every juncture, fulfilled all of the FCC's requirements, in favor of a party who not only plainly failed to comply with an existing substantive FCC rule but also failed to preserve any PRA challenge to that rule.

2. Realizing that, in light of the foregoing, its PRA claim was dead before the Commission and beyond all hope of resurrection on appeal, PortCell circumvented the judicial process by seeking a cure from Congress for its self-inflicted wound. Unbeknownst to Mr. Hutchison and Northeast, PortCell began an intense lobbying campaign in Congress. All the while, Mr. Hutchison and Northeast were busy operating the cellular telephone system PortCell so coveted, without any reason to suspect that the prior rulings in its favor were about to be cast aside by Congress.

In response to PortCell's one-sided pleas for assistance, then-Senator William Cohen of Maine pressured the FCC to reinstate PortCell's application. On January 15, 1995, Cohen wrote a letter to then-FCC Chairman Reed Hundt that, in Cohen's words, " 'urge[d] his prompt consideration of . . . whether the FCC complied with the Paperwork Reduction Act' " in dismissing PortCell's application. Pet. App. 41a (quoting Cohen letter). Even though they were self-evidently intended to overturn the FCC's award of the Portland cellular license to Northeast, these communications were made *ex parte* and were hidden from Northeast until disclosed by Commission staff.

PortCell, however, did not stop with *ex parte* contacts, which are expressly forbidden by law in the context of a comparative licensing proceeding before the FCC. See 47 C.F.R. § 1.1210 (1997). To the contrary, PortCell used NYNEX's considerable clout on Capitol Hill to acquire nothing short of a statutory change that could be used to force the FCC to disregard the *Northeast*

decision, as well as its prior rulings that PortCell's PRA claim had been waived and the statutory basis for those rulings. Soon, PortCell got what it had lobbied so hard to obtain.

Congressman Crapo, of Idaho, acting on behalf of NYNEX and PortCell, tacked onto an existing bill a new piece of legislation (one sentence in length) that became 44 U.S.C. § 3512(b). Section 3512(b) provides, in full: "The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto." *Id.* No hearings were held, and no Committee Report was prepared on the amendment. There is no indication that any Member of Congress other than the House and Senate sponsors who did PortCell's bidding ever considered the question whether the amendment would apply to cases pending prior to its enactment, nor did the provision incorporate language even remotely similar to that previously deemed necessary by this Court to justify application of a new law to pending cases. See *Landgraf*, 511 U.S. at 260 (citing as example of clearly retroactive statute a provision stating that a law " 'shall apply to all proceedings pending on or commenced after the date of the enactment of this Act' "). Instead, the provision simply became law effective October 1, 1995, along with the numerous other provisions in the omnibus bill in which Section 3512(b) was buried.

3. Armed with its new legislation, PortCell returned to the Commission to take its third bite at the apple on its PRA-based challenge to the 1991 dismissal of its application. On October 11, 1995, *four years* after its application had been dismissed and *one year* after Northeast completed construction of its own cellular system and began serving subscribers in Portland, PortCell moved to reinstate its application on PRA grounds, citing Section 3512(b) as removing the procedural bar to that claim. The FCC, having previously waived the financial qualifications rule *sua sponte* in order to grant the Portland

license to PortCell based on its familiarity with NYNEX, granted PortCell's motion. Pet. App. 24a-47a.

Even the Commission recognized that "strong policy reasons" existed for not entertaining PortCell's untimely and twice-rejected PRA claim (Pet. App. 30a), for to do so would produce harsh results and would totally undermine the goals of procedural regularity and administrative efficiency. Nevertheless, the FCC took the position that Section 3512(b) tied its hands, brushing aside well-supported arguments for interpreting the new statute as not applicable in this case. On the merits of PortCell's legislatively revived PRA claim, the FCC agreed that because the financial qualifications rule was not approved by OMB until after PortCell's application was submitted, Section 3512(a) of the PRA precluded dismissal of that application on financial qualifications grounds. *Id.* at 38a.

Consequently, in what can only be described as an amazing and outrageous turn of events, the FCC "rescind[ed] the grant of the application of Northeast" and "reinstate[d] *nunc pro tunc* and grant[ed] the application of Port[Cell]." Pet. App. 24a. The FCC granted Northeast interim operating authority that "will terminate ten days after Port Cell serves notice" that it is ready to begin service. *Id.* The Commisssion refused to stay its order pending appeal, but the court of appeals promptly issued a stay over the objection of the FCC and PortCell. *Saco River Cellular, Inc.* v. *FCC*, No. 91-1248 (D.C. Cir. Mar. 10, 1997) (per curiam).

Decision of the Court of Appeals

4. Northeast presented the following two bases for reversal, among others:

First, Northeast argued that applying Section 3512(b) to revive PortCell's procedurally defaulted PRA claim would violate the well-established rule that statutes will not be given retroactive effect unless their language contains an "express command" compelling that result.

See generally *Landgraf* v. *USI Film Prods.*, 511 U.S. at 265-73. Section 3512(b) was retroactive as applied to this case because PortCell's PRA claim had *already* been adjudged by the Commission (on two separate occasions) to have been waived under Section 405(a) prior to enactment of Section 3512(b) in 1995. By lifting that complete bar to PortCell's PRA claim, thereby stripping Northeast of a valid defense under prior law to PortCell's PRA challenge, Section 3512(b) plainly had impermissible retroactive effect under *Landgraf*. See, *e.g.*, *Hughes Aircraft Co.* v. *United States, ex rel. Schumer*, 117 S. Ct. 1871, 1878 (1997). As even the Commission agreed in its order (Pet. App. 33a), nothing in the text of Section 3512(b) addresses (much less "expressly commands") application of the statute to cases that were pending prior to its enactment.

Second, Northeast argued that even if Section 3512(b) could somehow be applied to this case consistent with *Landgraf* and its progeny, the separation-of-powers doctrine inherent in Article III precludes application of the statute. Under *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), once the judgment of a lower federal court becomes "final" in the constitutional sense, which occurs upon exhaustion of (or expiration of the time for pursuing) appellate remedies on direct review (*id.* at 227), that judgment is constitutionally immune from revision or invalidation based on later-enacted statutes. In 1990, the *Northeast* decision, pointedly instructing the FCC that it "*must* disqualify Port Cell's application" absent specified findings that indisputably could not be made based on the prior record (897 F.2d at 1167) (emphasis added), achieved that protected status when the 90-day period for seeking certiorari elapsed. By retroactively overriding this authoritative judicial instruction in 1995—which is explicitly denominated as "final" by statute, see 47 U.S.C. § 402(j), and which the FCC had long since complied with on remand—Section 3512(b) deprived *Northeast* of the dispositive effect to which it was constitutionally entitled.

5. The D.C. Circuit rejected each of these contentions and, in a sweeping published opinion, affirmed the FCC order in all respects. Pet. App. 1a-17a.

a. The court of appeals first considered Northeast's *Landgraf* argument. Ignoring the fact that PortCell's PRA claim had been adjudged waived under Section 405(a) not just once, but *twice*, prior to enactment of Section 3512(b), the court held that Section 3512(b) "does not offend any norm against retroactive lawmaking." Pet. App. 10a. To the court, Section 3512(b) merely "requires that, from October 1, 1995 onward, agencies and courts entertain arguments that would otherwise have been barred either by a statute of limitations or by the proponent's failure to have made the argument at an earlier stage in the administrative or judicial process." *Id.* at 9a. The court's response to Section 405(a), the prior legal basis for the Commission's previous refusals to entertain PortCell's untimely PRA claim, was terse: "§ 3512 'simply trumps Section 405(a).'" *Id.* (quoting 11 FCC Rcd at 20003). Although the court thus recognized that Section 3512(b) stripped Northeast of a statutory defense to the PRA claim, it made no attempt to reconcile its decision with this Court's holding in *Hughes* that such a statute operates retroactively and thus is subject to *Landgraf*'s presumption against retroactivity. See 117 S. Ct. at 1878.

b. Having construed the statute in a manner that retroactively eviscerated *Northeast*, the court of appeals was required to consider the separation-of-powers issue. On that issue, the court held that notwithstanding the contrary definition of finality given in *Plaut*, only a "final judgment terminating the case" is constitutionally protected against subsequent legislative abrogation. Pet. App. 11a. *Northeast* did not qualify as such, the court ruled, because it had "remanded [the case] to the Commission for further proceedings." *Id.* The court made no attempt to reconcile its ruling that a remand necessarily strips a judgment of finality under Article III with this Court's

holding in *Plaut* that a decision is "final," for Article III purposes, when it is no longer subject to direct review in higher courts (see 514 U.S. at 214 & 227), nor did the court address Section 402(j), which explicitly denominates as "final" appeals court decisions reversing and remanding FCC decisions. See 47 U.S.C. § 402(j). Accordingly, the court affirmed the Commission's order. Pet. App. 16a-17a.

6. Upon the denial of its petition for rehearing and suggestion for rehearing *en banc* on March 19, 1998, Northeast moved for a stay pending certiorari. Both the FCC and PortCell opposed the motion. On April 17, 1998, the court of appeals stayed its judgment pending certiorari in this Court. Pet. App. 18a-19a. Because this petition for certiorari was filed within 30 days of the issuance of the stay, it will remain in effect pending final action by this Court on the petition. See D.C. Cir. R. 41(a)(2).

REASONS FOR GRANTING THE PETITION

This case presents compelling reasons for this Court to intervene in this proceeding that has gone awry as a result of brazen, *post hoc* interference by Congress in a contested adjudicative proceeding. Based on subsequent legislation procured by PortCell, using the political clout of one of the Nation's largest corporations, the court below swept aside a whole host of final court and administrative decisions that had culminated in an award of the Portland cellular license to Northeast years before the effective date of Section 3512(b). Consequently, absent intervention by this Court, a party who complied with all existing requirements for the receipt of a license, and constructed a cellular system at great expense in order to provide service under that license, will be thrown out of business due to a competing applicant's ability to obtain from Congress legislation changing the rules after the game between Northeast and PortCell had been played.

In endorsing this fundamentally unjust result, the court of appeals rode roughshod over two time-honored legal protections against retroactive legislation. The first is that

once the federal court system has adjudicated a case before it, thereby fixing the rights and obligations of the parties, Congress cannot, by subsequent legislation, overturn (or compel the courts to overturn) that adjudication. See *Plaut*, 514 U.S. at 218-19. The second is that new laws, whether substantive or procedural, are presumed not to apply where the relevant event regulated by the law has already occurred. See *Landgraf* v. *USI Film Prods.*, 511 U.S. at 265-73. By departing from these bedrock principles of law, which provide essential protection to the citizen against unfair and potentially vindictive legislation, the extraordinary decision of the court below adopted a crabbed interpretation of this Court's precedents that has been rejected by other Circuits and that is itself contrary to controlling decisions from this Court. Accordingly, a writ of certiorari should issue to review the extraordinary decision of the court of appeals in this case.

I. THIS COURT SHOULD DECIDE WHETHER THE SEPARATION OF POWERS INHERENT IN ARTICLE III PROTECTS JUDICIAL JUDGMENTS REMANDING A CASE TO A LOWER TRIBUNAL AGAINST LEGISLATED INVALIDATION, AN IMPORTANT QUESTION THAT HAS DIVIDED THE CIRCUITS.

The court of appeals' ruling that Section 3512(b) required it to depart from its decision in *Northeast Cellular Telephone Co.* v. *FCC*, 897 F.2d 1164 (D.C. Cir. 1990), raises a grave constitutional question concerning the independence of the federal courts. As this Court has ruled, it is "deeply rooted in our law" that Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that a judgment conclusively resolves the case because a 'judicial Power' is one to render dispositive judgments." *Plaut*, 514 U.S. at 218-19 (quoting Art. III) (internal quotation marks omitted). "Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole. . . . Having achieved finality, however,

a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy[.]" *Id.* at 227. Once the line of finality is crossed, therefore, Article III interposes a "structural safeguard" to judicial autonomy that does not tolerate "the Legislature's nullifying prior, authoritative judicial action." *Id.* at 239 (emphasis omitted).

The court of appeals held that its own 1990 decision in *Northeast*, directing the FCC to disqualify PortCell's application given the undisputed absence of any basis in the record for a waiver of the financial qualifications rule, was not protected under Article III against legislative abrogation. The court reasoned that the protection of Article III applies only to a judgment that "terminat[es] the case" as a whole, leaving no other related proceedings pending in any court or administrative agency. Pet. App. 11a. By definition, the court held, *Northeast* was not such a judgment because it "remanded [the case] to the Commission for further proceedings." *Id.* This unprecedented ruling is contrary both to decisions of other Circuits and to controlling decisions of this Court.

A. The First Circuit Has Squarely Rejected The D.C. Circuit's Sweeping Ruling That Decisions Remanding A Case Are Never "Final" Under Article III And Thus Can Be Overturned At The Whim Of Congress.

In a recent decision, the First Circuit squarely rejected the view adopted by the court below—namely, that federal court decisions are not "final" under *Plaut* as long as proceedings on remand to a lower tribunal are contemplated, Pet. App. 11a. See *United States* v. *Vazquez-Rivera*, 135 F.3d 172 (1st Cir. 1998).

1. In that case, the court of appeals considered the effect of a post-remand statute on a decision by the court at an earlier stage of the proceedings. In a prior appeal, the court of appeals reviewed a district court's decision to enhance a carjacker's sentence because the defendant had committed a rape during the carjacking. The district court

concluded that, even without proof of physical or mental trauma, the rape itself showed that the victim had suffered "serious bodily injury," which is a ground for an enhanced sentence under 18 U.S.C. § 2119(2). The First Circuit vacated and remanded for resentencing, concluding that a rape, without more, does not constitute "serious bodily injury" under the statutory definition. *Vazquez-Rivera*, 135 F.3d at 173-74. The United States did not seek certiorari, but rather introduced evidence on remand of physical and mental trauma that the victim suffered as a result of the rape.

While the case was pending before the district court, the Carjacking Correction Act of 1996, Pub. L. No. 104-217, 110 Stat. 3020, was passed for the avowed purpose of overturning the appellate court's ruling. The Act amended the prior definition of "serious bodily injury" to include any conduct constituting "sexual abuse." The district court ruled that the additional evidence required by the prior decision of the court of appeals was unnecessary in light of the new statute, which it deemed "applicable to [the defendant's] remanded sentencing." 135 F.3d at 175. The First Circuit disagreed, holding that, in light of its ruling in the prior appeal, the new statute could not constitutionally be applied to the defendant under *Plaut*.

In an opinion by Chief Judge Torruella, the court began by noting that a retroactive increase in the punishment an offender faced for prior criminal conduct would violate the Ex Post Facto Clause. *Id.* at 177. The government responded by arguing that the new statute merely "clarified" the intent of the original statute, and thus did not actually increase the defendant's sentencing range under prior law. *Id.* That argument, the court ruled, merely pointed to another constitutional violation—namely, a violation of *Plaut*. *Id.*

Even though its prior decision remanded the case for resentencing, the First Circuit held that its prior decision was "final" and, as such, constitutionally protected against legislative abrogation under Article III. *Id.* The court explained:

> Painting black lines on the sides of a horse and calling it a zebra does not make it one. Similarly, labeling the 1996 amendment a "clarification" of Congress's intent in the original law is legally irrelevant. In the first appeal of this case, this court decided what Congress's intention was when it enacted the original statute. "Having achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was."

Id. (quoting *Plaut,* 514 U.S. at 227) (citation omitted). Accordingly, the court held it was "required to consider the new factual record in the light of our interpretation of Section 2119(2), *before it was amended in 1996.*" *Id.* (emphasis added).

In light of *Vazquez-Rivera*, there is a square Circuit split on whether appellate decisions remanding a case for further proceedings are "final" under *Plaut* where all avenues of direct appeal have been completed or forgone. The D.C. Circuit clearly ruled that they are not—that a remand necessarily strips the judgment of the constitutional protection it would otherwise enjoy. Pet. App. 11a. The First Circuit reached the opposite result, properly joining other Circuits in adhering to the definition of finality adopted in *Plaut*. See *Axel Johnson Inc.* v. *Arthur Andersen & Co.*, 6 F.3d 78, 84 (2d Cir. 1993) (holding that "a case remains 'pending,' and open to legislative alteration, so long as an appeal is pending or the time for filing an appeal has yet to lapse"); see also, *e.g.*, *Johnston* v. *CIGNA Corp.*, 14 F.3d 486, 489 n.4 (10th Cir. 1993) (same).

2. Consistent with *Vazquez-Rivera*, at least one other Circuit, while rejecting a *Plaut* challenge on other grounds, applied *Plaut* to a judgment that included a remand. See *Elramly* v. *INS*, 131 F.3d 1284 (9th Cir. 1997) (per curiam) (judgment remanding immigration case to Board

of Immigration Appeals). Unlike the court of appeals in this case, *Elramly* gave no weight whatsoever to the fact of the remand in determining whether the prior ruling was final under Article III. To the contrary—and quite properly—it analyzed the finality of a judgment containing a remand as it would any other judgment for Article III purposes, *i.e.*, under the definition of finality given in *Plaut* itself. *Id.* at 1285 (holding that " 'judgments from which all appeals have been forgone or completed' . . . are final and protected from the effects of new legislation") (quoting *Plaut*, 514 U.S. at 227). This Court should grant certiorari to resolve these conflicts among the Circuits, which directly implicate the independence of the federal judiciary.

B. The D.C. Circuit's Decision Below Is Contrary To Controlling Decisions Of This Court Concerning The Finality Of Judgments That Include A Remand.

The court of appeals made no attempt to reconcile its sweeping ruling that a judgment cannot be final under Article III if it includes a remand with applicable decisions of this Court, and for good reason.

1. Although one could not determine it from the opinion of the court below, *Plaut* itself provides the relevant definition of "final judgments." The Court in *Plaut* adopted the definition of finality enunciated in *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6 (1987): "By 'final,' we mean a case in which . . . the time for a petition for certiorari elapsed or a petition for certiorari [was] finally denied." See 514 U.S. at 214 (citing this passage from *Griffith*). It was especially appropriate to look to *Griffith* for the definition of finality because that case, like *Plaut* itself, dealt with the extent to which new rules of federal law can be applied to overturn prior judgments. See *Griffith*, 479 U.S. at 716 (holding that new judicial rulings as to matters of criminal procedure apply to all cases still open to, or pending on, direct review). The *Griffith* definition of finality, however, is more than a concept imported from another area of law; rather, *Plaut* deemed it "implicit in what Article III creates: not a batch of

unconnected courts, but a judicial department composed of 'inferior Courts' and 'one Supreme Court.'" 514 U.S. at 227 (quoting U.S. Const. art. III, § 1).

Plaut held that Article III draws "a distinction between judgments from which all appeals have been foregone or completed"—that is, "final" judgments—"and judgments that remain on appeal (or subject to being appealed)"—that is, non-final judgments. *Id.* at 227. Given that the time for seeking certiorari from *Northeast* expired in 1990, see 28 U.S.C. § 2101(c), that decision is plainly a judgment of the first variety. Any doubt on the score is dispelled by the fact that once the *Northeast* mandate issued, the case left the federal court system altogether and was returned to the FCC for compliance with the court's mandate, plainly indicating that *Northeast* was indeed "the last word of the judicial department" on the fate of PortCell's fatally flawed application. *Plaut*, 514 U.S. at 227. As such, *Northeast* is entitled under *Plaut* to protection against subsequent legislative abrogation.

Plaut provides another clear basis, in the FCC context, for rejecting the court of appeals' conclusion that a court decision remanding a matter necessarily is not final in the constitutional sense. The *Plaut* Court explicitly held that "[f]inality of a legal judgment is determined by statute." *Id.* Thus, instead of fashioning its own preferred definition of "finality," the court of appeals should have looked to the Communications Act to determine whether *Northeast* is a final decision. Had it done so, it would have discovered that the Act itself expressly denominates as "final" a court judgment reversing an order of the FCC and remanding a case to the Commission. See 47 U.S.C. § 402(j). Moreover, the Act specifically provides that on remand from such a judgment, "it shall be the duty of the Commission, in the absence of proceedings to review such judgment, to forthwith give effect thereto." *Id.* § 402(h). The court of appeals, therefore, not only flouted this Court's decision in *Plaut*—it usurped the role of Congress in delineating what classes of cases are open for authoritative resolution by the federal courts.

2. The court of appeals, in an apparent attempt to distinguish *Plaut*, noted that *Northeast* "did not purport to resolve" the PRA issues reopened by the Commission on remand (Pet. App. 11a)—a fact, incidentally, attributable to PortCell's own lack of due diligence. The panel's statement, though technically true, is irrelevant to the question at hand.

The "law" declared by *Northeast* was both clear and unequivocal—unless the prior record revealed a reasonable, non-preferential basis for waiver of the financial qualifications requirement, "the FCC *must* disqualify Port Cell's application." 897 F.2d at 1167 (emphasis added). As the Commission itself recognized on remand (6 FCC Rcd. at 2284), that clear instruction did not leave the Commission free to conjure up alternative grounds for salvaging PortCell's application, which was incurably flawed *ab initio*. Rather, the D.C. Circuit's instruction in *Northeast* compelled the Commission to dismiss PortCell's fatally infirm application, given the state of the record. It is this judicial judgment—which, like other court judgments, is entitled to full *res judicata* effect, barring not only claims that were presented, but also claims that could have been presented—that has been retroactively abrogated by Section 3512(b). This is precisely the result forbidden by *Plaut* and Article III.

Lacking any other colorable basis in *Plaut* for its ruling, the panel sought refuge in "the rule, which the Supreme Court acknowledged in *Plaut* itself, that 'each court, at every level, must decide [cases] according to existing laws.'" Pet. App. 11a (quoting *Plaut*, 514 U.S. at 227 (in turn quoting *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)). This rule is plainly inapposite. *Schooner Peggy* was a case pending on direct appellate review from a lower court when the law changed, see 5 U.S. (1 Cranch) at 110; consequently, as *Plaut* itself noted, the rule of *Schooner Peggy* is limited to "judgments *still on appeal* that were rendered before the law was enacted." 514 U.S. at 226 (emphasis added). *Northeast*, by contrast, was no longer on or subject to

direct appellate review, and thus became "final" under *Plaut*, once the 90-day period for seeking certiorari expired in 1990. See 28 U.S.C. § 2101(c); see also 47 U.S.C. § 402(j). The contrary holding of the court of appeals is simply unsupportable under *Plaut*.

C. The D.C. Circuit's Unprecedented Decision To Engraft A "Remand" Exception Onto Article III Threatens The Independence Of This Court And The Federal Judiciary As A Whole In Nonconstitutional Cases.

The panel's decision to engraft onto Article III a "remand" exception has broad implications for the institutional integrity of the federal court system. If the panel's view is sustained, a significant part—and perhaps even a majority—of the *corpus juris* will be subject to after-the-fact legislative abrogation in the very cases in which they were rendered because comparatively few appellate adjudications result in a simple affirmance or reversal that "terminat[es] the case," as the panel requires. Pet. App. 11a.

This is especially true of this Court itself, which routinely leaves the proper disposition of the entire case to the courts of appeals, and therefore commonly remands after deciding the question on which it granted certiorari. Under the exceedingly narrow view of *Plaut* adopted below, a question of statutory interpretation decided by this Court could be retroactively overturned by Congress in the *same* litigation in which the Court rendered it, as long as some aspect of the case remained pending on remand (or otherwise) in the lower courts or in an administrative agency. Needless to say, this result hardly bodes well for the institutional independence of this Court and would leave the handiwork of this Court (and all other federal courts) in nonconstitutional cases subject to being rendered merely advisory, contrary to Article III. Accordingly, the Court should grant certiorari to address these far-reaching implications for this Court and for the federal judicial system as a whole.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE PROPER APPLICATION OF THE PRESUMPTION AGAINST RETROACTIVITY TO CHANGES IN PROCEDURAL LAW.

The court of appeals also eviscerated an independent safeguard against retroactive lawmaking—the familiar presumption that statutes do not apply retroactively. This Court "ha[s] frequently noted, and just recently reaffirmed, that there is a 'presumption against retroactive legislation [that] is deeply rooted in our jurisprudence.'" *Hughes Aircraft Co.* v. *United States, ex rel. Schumer,* 117 S. Ct. 1871, 1876 (1997) (quoting *Landgraf,* 511 U.S. at 265). This entrenched rule of law rests on the view that "settled expectations should not be lightly disrupted" through retroactive applications of new statutes changing the law. *Landgraf,* 511 U.S. at 265. More to the point here, the rule reflects the recognition, articulated at the time of the Founding by James Madison, that retroactive legislation "offer[s] special opportunities for the powerful to obtain special and improper legislative benefits." *Id.* at 267 n.20 (citing *The Federalist No. 44,* at 301 (J. Cooke ed. 1961)). "Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen* v. *Georgetown Univ. Hosp.,* 488 U.S. 204, 208 (1988); see also *Lindh* v. *Murphy,* 117 S. Ct. 2059, 2062 (1997) (*Landgraf* "reaffirm[ed] that clear-statement rule").

The court of appeals did not (and could not) find that Section 3512(b) satisfied the clear-statement rule of *Landgraf.* As the FCC correctly conceded in its order, without contravention by the court below, "the statute itself does not explicitly address th[e] question" whether it applies to cases pending before its enactment. Pet. App. 33a. This concession was wise indeed because all Section 3512(b) does is indicate when, in a given proceeding, a PRA claim can be raised (*i.e.*, "at any time during the agency administrative process or judicial action applicable thereto," 44 U.S.C. § 3512(b)); it does *not* indicate at all (much less *clearly* indicate) to what class of proceedings

(pre- or post-enactment) it applies. See *Lindh*, 117 S. Ct. at 2064 n.4 (presumption against retroactivity satisfied only by "statutory language" that is "so clear that it could sustain only one interpretation"). Thus, the decisive question is whether Section 3512(b) is "retroactive" as applied to revive PortCell's previously rejected PRA challenge to the 1991 dismissal of its application. The holding of the court below that Section 3512(b) is not retroactive conflicts not only with this Court's decisions in *Landgraf* and *Hughes*, but also with the decisions of several other Circuits.

A. There Is Widespread Confusion Among The Circuits On The Proper Analysis Under *Landgraf* Of Procedural Changes As Applied To Pending Cases.

The Circuits are divided on the proper application of the presumption against retroactivity under *Landgraf* to newly enacted procedural rules. The dispute centers upon two statements in *Landgraf*: (1) "Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity" (511 U.S. at 275); and (2) "Of course, the mere fact that a new rule is procedural does not mean that it applies to every pending case," for it is "commonsense" that "the applicability of [new procedural] provisions ordinarily depends on the posture of the particular case." *Id.* at 275 n.29.

The Second Circuit has flatly refused to follow the second of the foregoing principles from *Landgraf*. See *Covino* v. *Reopel*, 89 F.3d 105, 108 (2d Cir. 1996) (holding that *Landgraf*'s discussion of that principle "is offered in dictum, far removed from the holding of *Landgraf*"), cert. denied sub nom. *Vann* v. *Darden*, 117 S. Ct. 1265 (1997). The court below was not as forthright as *Covino*—it simply ignored the relevant part of *Landgraf*, adhering instead to a constricted reading of *Landgraf* that was repudiated in *Hughes*. Pet. App. 10a. At least one other Circuit has pointedly rejected *Covino* and concluded that the discussion of procedural rules in *Landgraf* "is instruc-

tive of the Supreme Court's views and cannot be dismissed out of hand," adding that the discussion, "which eight Justices endorsed, carries more weight than much of the *Landgraf* analysis, which commanded a bare majority." *Wright* v. *Morris*, 111 F.3d 414, 419 (6th Cir.), cert. denied, 118 S. Ct. 263 (1997); cf. *Viacom Inc.* v. *Ingram Enters., Inc.*, Nos. 97-1950 & 97-2330, 1998 WL 169790, *2 (8th Cir. Apr. 14, 1998) ("[W]e will not brush aside as dicta the Supreme Court's pronouncement," which "is part of a carefully crafted holding on retroactivity that is binding on this court.").

Moreover, in a variety of statutory contexts, other courts of appeals have squarely adopted petitioner's view that under *Landgraf* newly enacted procedural rules cannot be applied to cases where prior procedures have already been applied. For example, as the Fifth Circuit explained in upholding an order denying expert witness fees that had been entered prior to enactment of a fee-shifting provision of the Civil Rights Act of 1991: "[T]he Court [in *Landgraf*] indicated that when a procedural matter has been properly decided under the old rule, and a new procedural rule is subsequently enacted while the ultimate resolution of the case is still pending, no reversal is required." *Shipes* v. *Trinity Indus.*, 31 F.3d 347, 349 (5th Cir. 1994); see also, *e.g.*, *United States* v. *Lopez*, 100 F.3d 113, 116-17 (10th Cir. 1996); *Herrera* v. *United States*, 96 F.3d 1010, 1011-12 (7th Cir. 1997) (Easterbrook, J.) (holding that under *Landgraf* a statute is retroactive if it "alter[s] the effect of procedural steps completed before its enactment"), cert. denied, 118 S. Ct. 1326 (1998). Similarly, the Ninth Circuit, in a decision cited with approval by this Court in *Hughes*, 117 S. Ct. at 1878, has ruled that "a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme." *Chenault* v. *United States Postal Serv.*, 37 F.3d 535, 537-39 (9th Cir. 1994); *contra* Pet. App. 9a (ruling that application of Section 3512(b) is not barred under *Landgraf* although the statute "requires that . . . agencies and courts entertain arguments

that would otherwise have been barred either by a statute of limitations or by the proponent's failure to have made the argument at an earlier stage").

Although the Circuit decisions involved different statutes, they each addressed an important, recurring question of law that is squarely presented here—namely, the extent to which subsequent changes in procedure can be applied, consistent with the presumption against retroactivity, to pending cases in which prior procedures have already been applied. These other Circuits correctly recognize that procedural rules have forbidden retroactive effect under *Landgraf* where, as here, prior procedures have already been applied in a given case. The court of appeals below, by contrast, took the opposite view, deeming changes in procedures to be prospective only as long as the case remains pending. Pet. App. 9a-10a.

In one sense, it is hardly surprising that this divergence of opinion has materialized as to the proper application of *Landgraf* to changes in procedural law. In *Landgraf* itself, Justice Scalia, joined by Justices Kennedy and Thomas, explicitly noted the need for further guidance from this Court on that important question. See 511 U.S. at 290-91 (Scalia, J., concurring in judgment) (criticizing as "ill-defined" the Court's stated exception to its declaration that changes in procedure often operate prospectively only). Nothing has occurred in the years since *Landgraf* to dispel the confusion on this question presaged in Justice Scalia's concurrence. In light of the continuing need for authoritative guidance from this Court on the proper analysis of new procedural laws under *Landgraf*, the Court should grant certiorari to consider that much-debated and frequently litigated question.

B. The D.C. Circuit's Ruling That Section 3512(b) Is Merely Prospective In This Case, Even Though PortCell's PRA Claim Had Already Been Adjudicated As Waived Under Prior Procedural Law, Is Contrary To Controlling Decisions Of This Court.

The court of appeals concluded that even though PortCell's claim was dead in this litigation long before PortCell and NYNEX won enactment of Section 3512(b) in 1995, Section 3512(b) is merely "prospective" as applied in this case and thus is not subject to the rule of *Landgraf* (Pet. App. 9a-10a). This conclusion is flatly contrary to this Court's decisions in *Hughes Aircraft Co.* v. *United States, ex rel. Schumer*, 117 S. Ct. 1871 (1997), and *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994).

1. The court of appeals, relying on *Landgraf*'s broad-brush illustration of certain ways in which legislation can potentially operate retroactively (511 U.S. at 269 n.23), concluded that application of Section 3512(b) is not impermissibly retroactive. The court held that Section 3512(b) "does not 'impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" Pet. App. 10a (quoting *Landgraf*, 511 U.S. at 280). This exceedingly narrow interpretation of *Landgraf*, limiting the presumption against retroactivity to cases where one of the foregoing effects has occurred, was entirely consistent with the D.C. Circuit's prior decision (written by the same author) in *DIRECTV, Inc.* v. *FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997), where the court even more explicitly held that a statute is retroactive only if it has one of the three effects enumerated in *Landgraf*. The notion that *Landgraf* and the law's presumption against retroactivity are so limited, however, was squarely (and unanimously) rejected by this Court in *Hughes*.

In *Hughes*, this Court explained that such a narrow view of the presumption "simply misreads our opinion in *Landgraf*." 117 S. Ct. at 1876. The Court observed that

the language from *Landgraf* invoked by the panel as a limitation on the presumption "does not purport to define the outer limit of impermissible retroactivity." *Id.* Instead, *Landgraf* "merely described that any such effect constituted a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity." *Id.* Therefore, contrary to the panel, it was not at all fatal to Northeast's claim that Section 3512(b) assertedly did not operate in one of the three ways described in *Landgraf*.

2. The myopic focus of the court of appeals on the foregoing statement in *Landgraf*, in addition to being flatly inconsistent with *Hughes*, led the court to overlook that part of *Landgraf* that plainly supports petitioner's retroactivity argument. *Landgraf* held (and eight Justices agreed) that a procedural rule would have forbidden retroactive effect if applied to a case in which the prior procedural rule has already been applied. See, *e.g.*, *Landgraf*, 511 U.S. at 275 n.29 ("A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial."); see also *id.* at 291-92 (Scalia, J., concurring in judgment) (where event regulated by "procedural rule" has already occurred prior to enactment of new procedural rule, the new rule "would unquestionably not be applied"). Once that point in a particular proceeding has been reached, and prior procedures applied in a particular case, it is "commonsense" that the parties have "reliance interests in matters of procedure" and therefore are entitled to the protection of the presumption against retroactivity. *Id.* at 275 & n.29.

The Court relied on this analysis in holding that the presumption barred application of a new, concededly procedural rule (*i.e.*, that Title VII plaintiffs are entitled to a jury trial) to pending cases in which bench trials had already been conducted. *Id.* at 281 n.34. Thus, *Landgraf*

clearly holds that even procedural rules can run afoul of the anti-retroactivity rule where, as here, the old procedural rule had already been applied in a particular case by the time the new procedural rule was enacted. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. at 229 (explaining that under *Landgraf* once procedural rules governing "pleading and proof . . . have been applied in a case," any change in those rules is retroactive in that case, and thus may not be applied unless "the statute clearly so requires," even if the case remains pending) (citing *Landgraf*, 511 U.S. at 275 n.29).

This case involves precisely the situation addressed in *Landgraf*—where old procedural rules are applied in a case, followed by enactment of a fundamentally different procedural rule. The *prior* procedural rule—the one in existence the first two times PortCell belatedly raised, and the FCC rejected, its PRA defense—did not require the Commission to consider an untimely PRA defense. See 47 U.S.C. § 405(a). Not just once, but *twice*, the Commission applied this longstanding statutory rule of procedure to PortCell prior to enactment of Section 3512(b), and both times declined to entertain PortCell's untimely PRA defense. See 9 FCC Rcd. at 3292; 8 FCC Rcd. at 4146 n.4.

Because its PRA claim was indeed dead under the old procedural rule previously applied in this proceeding by the FCC, PortCell circumvented the judicial process and successfully lobbied certain Members of Congress to tack onto another piece of legislation a provision creating a new procedural rule—Section 3512(b)—that might be read as resuscitating its previously waived (and twice-rejected) PRA claim. This time, acting under the *newly enacted* procedural rule, the Commission reversed course, considering itself "required to consider" PortCell's twice-rejected PRA argument "at this late stage." Pet. App. 30a. In affirming that decision, the court of appeals "agree[d] with the Commission that § 3512 'simply

trumps Section 405(a).'" Pet. App. 9a. In doing so, the court necessarily (albeit unwittingly) acknowledged that Section 3512 ushered in a profound—indeed, *outcome-determinative*—after-the-fact change in the procedural landscape applicable to this proceeding. The presumption against retroactivity exists for the very purpose of preventing the dislocation and unfairness that, as this case so poignantly illustrates, often results from such changes in law.

* * * *

In sum, this case presents precisely the sort of abrupt shift in law, sweeping away reliance interests grounded in adjudications based on prior law, that Article III and the presumption against retroactivity have served for centuries to prevent. As a result of heavy lobbying behind closed doors, a politically powerful entity was able to secure enactment of a statute that, as the court put it, "trumps" its own prior decision in Northeast's favor and the very rule of law that had properly been applied to PortCell's PRA claim. The result of Congress' *post hoc* lawmaking could hardly be more inequitable—a party who has, at every juncture, played (and ultimately *won*) the lottery game by the FCC's rules is suddenly rendered a loser, and forced to surrender a valuable government franchise in which it has invested heavily, simply because the rules were dramatically changed *after* the game between Northeast and PortCell had been played. This Court should grant certiorari to resolve the decisional conflicts identified above and to ensure that the protections of Article III and the presumption against retroactivity are not rendered utterly meaningless.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 30, 1997 Decided January 16, 1998

No. 91-1248

SACO RIVER CELLULAR, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

NORTHEAST CELLULAR TELEPHONE COMPANY, L.P. AND
PORTLAND CELLULAR PARTNERSHIP
Intervenors

Consolidated with
Nos. 93-1423, 96-1439

Appeals from Orders of the
Federal Communications Commission

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Alan Y. Naftalin argued the cause for appellant Northeast Cellular Telephone Company, L.P., with whom *Peter M. Connolly, Carter G. Phillips* and *Stephen F. Smith* were on the briefs.

Theresa Fenelon argued the cause for appellant Saco River Cellular, Inc., with whom *Harold J. Carroll* was on the briefs.

Laurence H. Schecker, Counsel, Federal Communications Commission, argued the cause for appellee, with whom *William E. Kennard*, General Counsel, *Daniel M. Armstrong*, Associate General Counsel, and *Roberta L. Cook*, Counsel, were on the brief. *John E. Ingle*, Deputy Associate General Counsel, and *Renee Licht*, Counsel, entered appearances.

Anne M. Lobell, Counsel, U.S. Department of Justice, argued the cause for amicus curiae United States of America, with whom *Frank W. Hunger*, Assistant Attorney General, U.S. Department of Justice, *Mary Lou Leary*, U.S. Attorney, *Marleigh D. Dover*, Special Counsel, U.S. Department of Justice, and *Richard A. Olderman, Attorney*, were on the brief

Alan Y. Naftalin, Peter M. Connolly, Mark D. Schneider and *Michael A. Nemeroff* were on the brief for intervenor Northeast Cellular Telephone Company, L.P. *Herbert D. Miller, Jr.* entered an appearance.

Theresa Fenelon and *Harold J. Carroll* were on the brief for intervenor Saco River Cellular, Inc.

L. Andrew Tollin and *Michael Duele Sullivan* were on the brief for intervenor Portland Cellular Partnership. *Charles D. Ossola* and *Michael B. Barr* entered appearances.

Before: EDWARDS, *Chief Judge*, and GINSBURG and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: Appellants Saco River Cellular, Inc. and Northeast Cellular Telephone Co., L.P., applicants for a license to provide cellular telephone service in the Portland, Maine area, challenge a series of decisions by the Federal Communications Commission culminating in the award of the license to Portland Cellular Partnership (PortCell). In the most recent decision under review, the Commission concluded that the 1995 amendments to the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*, required it to reinstate PortCell's application, which it had previously dismissed, and consequently to award the license to PortCell. We agree that the 1995 amendments to the PRA obligated the Commission to reconsider its dismissal of PortCell's application. Accordingly, we affirm the agency order awarding the license to PortCell and dismiss as moot Saco River's challenge to the Commission's handling of its application.

I. BACKGROUND

In 1986 the Commission held a lottery for a license to offer cellular phone service in the Portland area. Seacoast Cellular, Inc. placed first among five applicants, followed by Saco River, Community Services Telephone Co., Northeast, and NYNEX Mobile Communications Co. Shortly thereafter Seacoast amended its application to substitute PortCell, a general partnership the original partners of which were Seacoast, NYNEX Mobile, and Community, as the winning applicant. (The current partners are Seacoast, NYNEX Mobile, and Lewiston-Auburn Cellular.)

Saco River and Northeast, the remaining two applicants, objected that PortCell was ineligible for a license because it had failed to "obtain a firm financial commitment for the financing necessary to construct and operate for one year its proposed cellular system and amend its application to so demonstrate," as required by 47 C.F.R. § 22.917(b)(1) (1986). The regulation then in force provided that:

> The firm financial commitment . . . shall be from a recognized bank or other financial institution and shall evidence the lender's determination that it has assessed the creditworthiness of the loan applicant and that it is committed to providing the necessary financing, including any actions required of the applicant to continue the commitment in force. Applicants obtaining financing from other than a recognized lending institution must submit proof that the financing entity has such funds available and uncommitted to another cellular application.

47 C.F.R. § 22.917(b)(1)(i) (1986). As evidence of the financial commitment it had obtained, PortCell submitted a letter of credit from NYNEX Credit Corp.

In 1989 the Commission agreed with Saco River and Northeast that PortCell's application was defective to the extent that the letter of credit did not include the terms of the proposed loan and failed to indicate that NYNEX Credit had assessed PortCell's creditworthiness. Nonetheless, the Commission waived the firm-financial-commitment requirement and granted the license to PortCell on the basis of the Commission's "lengthy [sic] experience in dealing with NYNEX Corporation and its various subsidiaries and affiliates." *Portland Cellular Partnership*, 4 FCC Rcd 2050, 2051 (1989).

In 1990 this court vacated that decision as arbitrary and capricious because the waiver of the firm-financial-commitment requirement "was not based on any rational waiver policy." *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1167. Upon remand the Commission, finding that it could not justify the waiver, dismissed PortCell's application as defective. *Portland Cellular Partnership*, 6 FCC Rcd 2283 (1991).

The Commission also dismissed Saco River's application as defective because Saco River's proposed service contour extended beyond the Portland service area. The Commis-

sion determined that, because the proposed extension involved more than *de minimis* encroachments into adjacent service areas, Saco River would not be permitted to amend its filing to bring it into compliance with the applicable rules. *Id.* at 2284.

With PortCell and Saco River no longer in the running, the Commission designated Northeast as the tentative selectee. *Id.* Community filed a timely motion to reconsider. Nearly a year later PortCell filed its own petition to reconsider, arguing for the first time that the Commission had erred in dismissing its application because the firm-financial-commitment reporting requirement had not been approved by the Office of Management and Budget. The Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*, provides that "[a]n agency shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information . . . the Director [of the OMB] has approved the proposed collection of information." 44 U.S.C. § 3507(a). The Commission responded that it had no authority to consider PortCell's petition because the petition was filed too late. *Portland Cellular Partnership*, 8 FCC Rcd 4146, 4146 n.4 (1993).

In 1993 the Commission denied Community's petition for reconsideration, *id.* at 4149-50, and granted Northeast's application over the objections of Saco River and PortCell, *id.* at 4150-52. PortCell filed a timely petition for reconsideration of the grant of Northeast's application. In addition, PortCell and Community filed petitions for further reconsideration of the dismissal of PortCell's application, with PortCell again raising its PRA objection.

In 1994 the Commission denied PortCell's and Community's petitions for further reconsideration of the order dismissing PortCell's application. In a somewhat different analysis than it had offered when it first denied PortCell's petition for reconsideration, the Commission explained that, because Community's original rehearing petition had been timely, the agency was free upon reconsidera-

tion thereof to entertain any relevant argument, including the PRA argument in PortCell's untimely petition. The Commission then declined to exercise its discretion to consider PortCell's "grossly untimely" PRA objection because

> Port Cell's failure to avail itself of this argument when its compliance with [the Commission's] financial qualifications rule was first called into question imposed a particularly heavy burden on the resources of the court, the Commission and the other parties . . . litigating the issue of Port Cell's compliance.

Portland Cellular Partnership, 9 FCC Rcd 3291, 3292 (1994). Meanwhile, the Commission deferred reconsideration of its grant of Northeast's application, *id.* at 3291 n.2, and Northeast constructed a cellular system that has been operating in the Portland market since November 1994.

In 1995 the Congress added subsection (b) to the "public protection" provision of the PRA. The amended version provides:

> (a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this chapter if—
>
> > (1) the collection of information does not display a valid control number assigned by the Director [of the OMB] in accordance with this chapter; . . . .
>
> (b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.

44 U.S.C. § 3512. PortCell then filed yet another petition for reconsideration, this time asserting that § 3512 (b) requires the Commission to consider its PRA argument.

In 1996 the Commission agreed that because the administrative proceedings were still ongoing, the amended statute required it to consider PortCell's PRA defense. The Commission then determined that it had violated the PRA by dismissing PortCell's application on the basis of an unapproved request for information about financial commitments. *Portland Cellular Partnership,* 11 FCC Rcd 19997, 20001-06 (1996). Accordingly, the Commission allowed PortCell to amend its application to satisfy the firm-financial-commitment requirement, and PortCell submitted a 1995 letter of credit from Fleet Bank of Maine. Although this financial showing did not illuminate what commitment, if any, PortCell had obtained as of the time of its selection in 1986, the Commission accepted PortCell's amendment in satisfaction of the firm-financial-commitment requirement. The Commission thereupon rescinded its grant of the license to Northeast and awarded the license to PortCell. *Id.* at 20013. Upon the motion of Northeast, this court stayed the Commission's 1996 order pending judicial review.

Both Northeast and Saco River appealed. Because Saco River placed second behind PortCell in the lottery for the Portland license, however, we need consider Saco River's challenge to the dismissal of its application only if we determine that the Commission erred in awarding the license to PortCell.

II. ANALYSIS

Northeast presents six arguments why the Commission erred when it revoked Northeast's license to serve the Portland market: (1) the Communications Act prevents the Commission from considering PortCell's belated argument invoking the PRA; the Commission's application of § 3512(b) of the PRA to this case (2) is an impermissible retroactive application of the new statute, and (3) reverses this court's 1990 decision in *Northeast v. FCC,* in violation of the separation-of-powers doctrine; (4) the lack of an OMB control number does not excuse Port-

Cell's failure to comply with the statutory requirement to submit information to the Commission; (5) the OMB approved the firm-financial-commitment rule before it was "enforced" against PortCell; and (6) the firm-financial-commitment requirement is a substantive requirement for a license, not merely a collection of information. For the reasons detailed below, we reject all these arguments and affirm the Commission's 1996 order.

A. Did § 3512 Require the Commission to Consider PortCell's PRA Defense?

In the order under review the Commission acknowledged that "strong policy reasons" counseled against considering PortCell's PRA defense. 11 FCC Rcd. at 20001. The Commission believed that it was required to do so, however, because it understood the 1995 amendments to the PRA as allowing any adversely affected person "to raise PRA violations without limitation, so long as the administrative or judicial process in connection with a particular license or with a particular application continues." *Id.* at 20003. We agree with that reading of the Act as amended.

1. The Communications Act

According to Northeast, the Commission violated §§ 402(h) and 405(a) of the Communications Act when it considered PortCell's PRA defense. Section 402(h) requires the Commission, after a case has been remanded by this court, to give effect to our judgment "upon the basis of the proceedings already had and the record upon which [the] appeal was heard and determined." 47 U.S.C. § 402(h). Section 405(a) establishes a 30-day deadline for filing petitions for reconsideration. 47 U.S.C. § 405 (a). The Commission responded to Northeast's argument as follows:

> We are not waiving the financial qualification requirements for licenses in contravention of the court's

> mandate. Instead, we are considering whether the financial qualification requirement regulation is valid and enforceable under the PRA. Section 402(h) does not restrict us from doing so. In any event, Section 3512 of the PRA . . . overrides any restriction 402 (h) might place on our consideration of PRA issues in a proceeding on remand from a court.

11 FCC Rcd at 20005.

We need not address today what restrictions §§ 402 (h) and 405(a) of the Communications Act impose when § 3512 of the PRA is not invoked. Because § 3512 of the PRA applies by its terms "notwithstanding any other provision of law," we agree with the Commission that § 3512 "simply trumps Section 405(a) and, to the extent it might be relevant, Section 402(h)." *Id.* at 20003; *see Liberty Maritime Corp. v. United States,* 928 F.2d 413, 416 (D.C. Cir. 1991) (similar "notwithstanding" clause "supercede[s] all other laws").

2. Retroactivity

Northeast argues that applying the PRA amendments to this case contravenes the principle that retroactivity is not favored in the law. As we recently noted, however, in determining whether a statute has retroactive effect it is necessary "to examine the temporal relationship between the statute and the activity the statute is meant to govern." *Legal Assistance for Vietnamese Asylum Seekers v. Department of State,* 104 F.3d 1349, 1352 (D.C. Cir. 1997). Section 3512(b) requires that, from October 1, 1995 onward, agencies and courts entertain arguments that would otherwise have been barred either by a statute of limitations or by the proponent's failure to have made the argument at an earlier stage in the administrative or judicial process. In this case, the Commission had dismissed PortCell's PRA defense as untimely without ruling upon the merits of it; the PRA amendments merely re-

quired the Commission, when the issue was raised anew, to make that ruling. Because § 3512(b) governs only the conduct of litigation after the effective date of the statute and does nothing to reopen matters litigated before that date, it does not offend any norm against retroactive lawmaking.

Nor is a statute retroactive "merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994). By permitting parties to raise the PRA issue 'at any time' in ongoing proceedings, the statute does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. Rather, it simply prevents an agency or court from refusing to consider a PRA argument on the ground that it is untimely.

We conclude that the Commission correctly interpreted the amended statute as requiring it to consider PortCell's PRA defense when that defense was raised in the ongoing proceedings upon remand.

3. Separation of powers

Northeast argues that even if § 3512(b) can be applied to ongoing proceedings in other circumstances, its application in this case would effectively reverse our decision in *Northeast v. FCC*, in violation of the separation-of-powers doctrine as the Supreme Court interpreted it in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). *Plaut* was a sequel to *Lampf, Pleva, Lipkind, Prupis & Petrigrow v. Gilbertson*, 501 U.S. 350 (1991), in which the Court had announced a new statute-of-limitations rule for certain securities fraud suits. The Congress had responded to the *Lampf, Pleva* decision by passing a law purporting to revive suits that had been dismissed in the wake of *Lampf*,

Pleva, but the Court held in *Plaut* that, as an attempt by the Congress to reopen a final judgment, the new law was unconstitutional. 514 U.S. at 225. According to Northeast, application of § 3512(b) in this case would likewise nullify this court's determination in *Northeast*, which became final when PortCell failed to seek review in the Supreme Court, that the Commission "must disqualify" PortCell's application if the agency could adduce no rational waiver policy to support it. 897 F.2d at 1167.

Plaut is no bar to the application of § 3512 to the present case, however, because no party in *Northeast* raised, and we did not purport to resolve, the PRA issue. Nor did we render a final judgment terminating the case; rather we remanded it to the Commission for further proceedings. For the Commission and the court to apply § 3512 to this case after October 1, 1995, therefore, is merely to follow the rule, which the Supreme Court acknowledged in *Plaut* itself, that "each court, at every level, must 'decide according to existing laws.' " 514 U.S. at 226 (quoting *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801)).

B. Did the Commission Violate the PRA?

The public protection provision of the PRA provides that "no person shall be subject to any penalty for failing to comply with a collection of information" that lacks a currently valid OMB control number. 44 U.S.C. § 3512 (a). When PortCell filed its application, the Commission had not obtained OMB approval for the firm-financial-commitment filing requirement then codified at 47 C.F.R. § 22.917(b) (1986). Therefore, to the extent that § 22.917(b) mandated a collection of information, the Commission could not lawfully penalize PortCell for failing to comply with it.

Northeast makes three arguments for the proposition that § 3512 of the PRA does not prevent the Commission

from punishing PortCell for failing to comply with § 22.917(b): First, the mandate to demonstrate a firm financial commitment originated with the Congress (as opposed to the Commission); therefore PortCell was obligated to comply with the filing requirement regardless of the Commission's failure to comply with the PRA. Second, the Commission's failure to comply with the PRA was at most harmless error because the Commission had obtained an OMB control number for § 22.917(b) by the time it penalized PortCell. Third, § 22.917(b) is a substantive legal requirement rather than a "collection of information" requirement. For the reasons set out below, we reject these three arguments and conclude that the Commission was obliged, as it held, to permit PortCell to amend its application in order to demonstrate that it had complied with § 22.917(b).

1. Statutory obligation

Northeast contends that the requirement that an applicant demonstrate a firm financial commitment is a statutory obligation and therefore not subject to the PRA. The OMB's regulations clearly state that § 3512 "does not preclude the imposition of a penalty on a person for failing to comply with a collection of information that is imposed . . . by statute," 5 C.F.R. 1320.6(e), and we shall assume that is a reasonable interpretation of the law.

As the OMB has explained, however, that principle "does not extend to situations in which a statute authorizes, or directs, an agency to impose a collection of information on persons, and the agency does so." Controlling Paperwork Burdens on the Public; Regulatory Changes Reflecting Recodification of the Paperwork Reduction Act, 60 Fed. Reg. 30438, 30441 (1995). That is all that has happened here. Section 308(b) of the Communications Act provides that "[a]ll applications for station licenses . . . shall set forth such facts as the Commission

by regulation may prescribe as to the . . . financial . . . qualifications of the applicant to operate the station." 47 U.S.C. § 308(b). The Commission duly required that each applicant submit information showing that it had a firm financial commitment. There is no collection of information imposed by statute, much less a specific congressional command to provide information showing a firm financial commitment. The Congress merely authorized, it did not require, the Commission to collect information regarding the financial qualifications of applicants for a license. Accordingly, the Commission must itself have complied with the PRA before it may enforce that information collection requirement under § 308 of the Communications Act.

2. Harmless error

Northeast argues that the Commission's temporary failure to adhere to the PRA was harmless as far as PortCell is concerned. The OMB issued a control number for the firm-financial-commitment regulation in 1990, which was after the information was collected from PortCell but before the Commission dismissed PortCell's application (in 1991) for failure to comply with the regulation. Northeast reminds us that the PRA "does not prevent the promulgation of a rule, only its enforcement." *Dithiocarbamate Task Force v. EPA*, 98 F.3d 1394, 1405 (D.C. Cir. 1996).

Northeast's argument loses sight of the Congress's purpose in enacting the PRA—to "minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons." 44 U.S.C. § 3501(1). In order to fulfill that purpose, the PRA must protect a member of the public when the agency imposes the paperwork burden upon it, not merely when the agency relies upon the paperwork in making a decision, which

(as this case illustrates) can be years later. Therefore, an agency may not, having belatedly gotten OMB approval of an information collection requirement, punish a respondent for its faulty compliance while the collection was still unauthorized. Because § 22.917(b) lacked a control number when the Commission required that PortCell submit information about its financial commitment, the Commission could not punish PortCell for failing to submit the information it required.

3. Not a collection of information

The regulation in force at the time PortCell became the tentative selectee required that a cellular applicant "obtain a firm financial commitment for the financing necessary to construct and operate for one year its proposed cellular system and amend its application to so demonstrate." 47 C.F.R. § 22.917(b)(1) (1986). Northeast submits that this regulation is not a "collection of information" within the meaning of the PRA because it requires the tentative selectee not merely to provide information about but actually to obtain a firm financial commitment. The Commission, on the other hand, considers the regulation to be a collection of information because the selectee must provide the Commission with evidence of the commitment.

Clearly enough the regulation imposes both a substantive and a reporting requirement. The selectee must obtain a firm financial commitment as a precondition to receiving a license, and it must amend its application to demonstrate that it has obtained the commitment. The latter requirement is a collection of information; therefore, the Commission may not punish a selectee for failing to provide the information unless it has first obtained a valid OMB control number.

In the present case the letter of credit from NYNEX Credit that PortCell submitted in 1986 was "incomplete because it failed to provide all of the evidence required

by the regulation" and thus " 'failed to comply' with the requirement of the information collection." 11 FCC Rcd at 20007. The 1986 letter of credit did not, however, demonstrate that PortCell had failed to obtain the required firm financial commitment, and the Commission did not fault PortCell on that substantive ground. Therefore, this case involves PortCell's failure to comply with a collection of information that lacks an OMB control number and not, as Northeast would have it, PortCell's failure to fulfill an underlying substantive requirement. Accordingly, we have no occasion to decide whether the PRA prevents an agency from punishing a party for a failure to fulfill a substantive legal requirement that is brought to light only because that substantive requirement is also the subject of an information collection requirement.

C. Did the Commission Rely Upon Inapposite Information in Granting the License to PortCell?

The OMB regulations implementing the PRA require that where, as here,

> an agency has imposed a collection of information as a means for proving or satisfying a condition for the receipt of a benefit or the avoidance of a penalty, and the collection of information does not display a currently valid OMB control number . . . [the agency must] permit respondents to prove or satisfy the legal conditions in any other reasonable manner.

5 C.F.R. § 1320.6(c). Hence, the Commission appropriately allowed PortCell to amend its application in order to demonstrate that it had obtained the firm financial commitment that is a prerequisite to receiving a license to provide cellular service.

We note that the Commission disqualified PortCell for want of evidence that PortCell had obtained a firm financial commitment as of 1986, while PortCell's amended application demonstrates only that it had obtained a firm

financial commitment as of 1995; the amendment sheds no light upon what commitment, if any, PortCell had obtained in 1986. *Cf., e.g., Pontchartrain Broadcasting Co. v. FCC*, 15 F.3d 183, 184 (D.C. Cir. 1994) ("In cases involving amendment of an applicant's initial financial certification, the Commission generally requires that the applicant also demonstrate that it had a reasonable assurance of financing at the time that it made its initial certification." (citing *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603-04 (1991))). At oral argument Northeast responded to an inquiry from the court by arguing for the first time that the Commission erred in accepting PortCell's amendment because it failed to demonstrate that it had a firm financial commitment as of 1986. As the Commission correctly noted in its 1996 order, however, before the agency "Northeast [did] not oppose the amendment or argue that it is insufficient." 11 FCC Rcd at 20008. Because no one challenged the amendment as anachronous before the Commission, the agency did not have an opportunity to consider that charge. Therefore, the issue was neither preserved nor presented for our review, and we do not pass upon it. *Cf. United States v. Tucker Truck Lines*, 344 U.S. 33, 37 (1952) ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that court should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice"); *Center for Auto Safety v. Peck*, 751 F.2d 1336, 1360 (D.C. Cir. 1985) ("Such an ambush at this late stage cannot be allowed").

III. CONCLUSION

For the foregoing reasons we affirm the Commission's order rescinding the grant of the Portland, Maine Block B cellular license to Northeast, reinstating PortCell's application, and granting the license to PortCell. Accordingly,

we vacate our order of March 10, 1997 staying the Commission's order, and we dismiss as moot Saco River's challenges to the Commission's handling of its application for a cellular license.

It is so ordered.

APPENDIX B

[Filed Apr. 17, 1998]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1997

No. 91-1248

SACO RIVER CELLULAR, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

NORTHEAST CELLULAR TELEPHONE COMPANY, L.P.
and PORTLAND CELLULAR PARTNERSHIP,
Intervenors

Consolidated with 93-1423, 96-1439

BEFORE: Edwards, Chief Judge, Ginsburg and Tatel, Circuit Judges.

ORDER

Upon consideration of the motion for stay of mandate, the responses thereto and of the replies, it is

ORDERED that the motion is granted. The Clerk is directed to withhold issuance of the court's mandate for a period of thirty days from the date of this order.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX C

[Filed Mar. 19, 1998]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1997

No. 91-1248

SACO RIVER CELLULAR, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

NORTHEAST CELLULAR TELEPHONE COMPANY, L.P.
and PORTLAND CELLULAR PARTNERSHIP,
Intervenors

Consolidated with 93-1423, 96-1439

BEFORE: Edwards, Chief Judge, Ginsburg and Tatel, Circuit Judges.

ORDER

Upon consideration of intervenor's petition for rehearing filed March 2, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX D

[Filed Mar. 19, 1998]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1997

No. 91-1248

SACO RIVER CELLULAR, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

NORTHEAST CELLULAR TELEPHONE COMPANY, L.P.
and PORTLAND CELLULAR PARTNERSHIP,
Intervenors

Consolidated with 93-1423, 96-1439

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges.

ORDER

Upon consideration of intervenor's Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX E

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In re Applications of:

PORTLAND CELLULAR PARTNERSHIP) File No. 27414-CL-P-152-B-86

NORTHEAST CELLULAR TELEPHONE COMPANY, L. P.) File No. 27488-CL-P-152-B-86

For facilities in the Domestic Public Cellular Radio Telecommunications Services on Frequency Block B, in Market 152, Portland, Maine

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ORDER

Adopted: November 18, 1996;

Released: November 21, 1996

By the Commission:

I. INTRODUCTION

1. In this order, we reinstate *nunc pro tunc* and grant the application of Portland Cellular Partnership ("Port Cell") to provide Block B cellular service to the Portland, Maine, New England County Metropolitan Area ("NECMA"). In light of this action, we also rescind the grant of the application of Northeast Cellular Telephone Company, L. P. ("Northeast") to provide the same cellular service, and dismiss as moot Port Cell's petition for

reconsideration of the grant of that application. In addition, we grant interim operating authority to Northeast that will terminate ten days after Port Cell serves notice to avoid interruption of service to Northeast's customers.

II. BACKGROUND

2. This proceeding has a complicated and protracted history. Although the applications were filed ten years ago, and the Commission has issued four orders, there is still not a final grant in this proceeding.

3. Originally, there were five participants in the lottery for the wireline authorization in Portland. The applicants were selected in the following order: Seacoast Cellular, Inc. ("Seacoast"), Saco River Cellular, Inc. ("Saco River"), Community Services Telephone Company ("Community"), Northeast, and NYNEX Mobile Communications Company ("NYNEX"). As part of a prelottery partial settlement agreement, Seacoast substituted its application with the application of Port Cell.[1] Port Cell was then named the tentative selectee.[2]

4. Northeast and Saco River filed petitions against Port Cell alleging, *inter alia*, that Port Cell's application did not comply with Section 22.917(b)(1) of the Commission's Rules.[3] They claimed that a firm financial commitment letter provided by NYNEX Credit Company to Port Cell was inadequate. The staff rejected these arguments, and granted an authorization to Port Cell.[4] The

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[1] At that time, the Port Cell partnership consisted of Seacoast (holding a 42 percent interest), NYNEX (48 percent), and Community (10 percent). Port Cell's ownership has since been divided equally among NYNEX, Seacoast, and Lewiston-Auburn Cellular.

[2] *See* Public Notice, Report No. CL-86-206A (released June 24, 1986).

[3] 47 C.F.R. 22.917(b)(1) (1986).

[4] *Portland Cellular Partnership*, 2 FCC Rcd 5586 (Mobile Serv. Div. 1987).

Commission affirmed the grant to Port Cell on different grounds. It held that Port Cell's application did not comply with Section 22.917(b)(1), but waived the required showing, stating that "based on our experience regarding NYNEX Mobile and NYNEX Corporation in other markets and other contexts, and materials on file in other proceedings of which we take official notice, we are quite confident that Port Cell (whose financing was arranged through NYNEX Mobile) is financially qualified." *Portland Cellular Partnership*, 4 FCC Rcd 2050, 2051 (1989) ("*Port Cell I*").

5. Northeast and Saco River appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit. The Court ruled that the Commission's decision was arbitrary and capricious because it was not based on a rational waiver policy, and therefore reversed and remanded the case to the Commission. *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) ("*Northeast Cellular*"). The court instructed the Commission that "absent a finding" that certain financial information "was considered and used in formulating an articulable waiver standard at the time the waiver was granted, the FCC must disqualify Port Cell's application." *Id.* at 1167. The court also indicated that "given the record in this case, we cannot imagine any standard that would have justified a waiver. . . ." *Id.* at 1165. On remand, the Commission found that Port Cell had not met the Section 22.917(b)'s firm financial commitment requirement. *Portland Cellular Partnership*, 6 FCC Rcd 2283, 2283-84 (1991) ("*Port Cell II*"). It also found that Port Cell had provided the Commission with no standard that would support waiver of the financial qualifications requirement, and accordingly the Commission denied the waiver and dismissed the application.[5] *Id.* at 2284. To prevent the loss of competi-

[5] The application of the next ranked applicant, Saco River, was returned as defective because it had proposed a 39 dBu contour

tion and service in the Portland market, however, the Commission granted Port Cell interim operating authority. *Id.*

6. The Commission's staff then named Northeast as the tentative selectee.[6] Port Cell, Saco River, and Community all filed petitions to deny Northeast's application. In *Portland Cellular Partnership*, 8 FCC Rcd 4146 (1993) ("*Port Cell III*"), the Commission denied the petitions to deny and granted Northeast's application. The Commission reaffirmed its dismissal in *Port Cell II* of Port Cell's and Saco River's applications. In addition, it dismissed Port Cell's petition for reconsideration of the dismissal of its application in *Port Cell II*, which raised for the first time issues regarding the Paperwork Reduction Act ("PRA"),[7] because the petition was filed nearly a year after the statutory deadline for filing such a pleading. The Commission stated that it had no discretion to consider such a pleading.[8] *Port Cell III*, 8 FCC Rcd at 4146 n.4. Finally, the Commission modified Port Cell's interim authority to allow it to continue operation until Northeast was ready to commence service. *Id.* at 4152.

7. Port Cell and Community each timely filed petitions for reconsideration of *Port Cell III* regarding the grant of Northeast's application to serve Portland. Port Cell additionally filed a petition for further reconsideration of the

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extension into the adjoining NECMA which was not *de minimis*. *See* 47 C.F.R. § 22.20 (1990). Saco River sought judicial review of this action. *Saco River Cellular, Inc. v. FCC*, No. 91-1248 (D.C. Cir. filed May 24, 1991) ("*Saco River*"). This case has been held in abeyance pending conclusion of these administrative proceedings.

[6] Public Notice, Report No. CL-9-39 (Mobile Serv. Div. released April 30, 1991).

[7] 44 U.S.C. §§ 3501-3520.

[8] Section 405 of the Communications Act of 1934, as amended, establishes a 30-day deadline for filing petitions for reconsideration. 47 U.S.C. § 405.

dismissal of its application, and a motion to stay that decision. In its motion for stay, Port Cell argued that the PRA precluded the Commission's actions. The staff denied the motion.[9] The D.C. Circuit also denied Port Cell's contemporaneous motion which raised similar arguments.[10]

8. In *Portland Cellular Partnership*, 9 FCC Rcd 3291 (1994) ("*Port Cell IV*"), the Commission affirmed its dismissal of Port Cell's petition for reconsideration as untimely. *Id.* at 3291-92. It found that Port Cell's failure to raise its PRA arguments in a timely manner imposed a heavy burden on the court, the Commission, and the other parties to this proceeding because resources were consumed litigating Port Cell's compliance with the financial qualifications rule and the related waiver issue. *Id.* at 3292. Moreover, the Commission found no countervailing public interest reason to reconsider its prior decision on its own motion, particularly in light of the court's instruction that it "must disqualify Port Cell's application" in the absence of certain financial information not present. *Id.* at 3292 n.3. Therefore, it denied the petition. The Commission also dismissed in part and denied in part Community's petition for reconsideration. *Id.* at 3292. Port Cell sought review and a stay pending review of

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[9] *Portland Cellular Partnership*, 8 FCC Rcd 6213 (Com. Car. Bur. 1993).

[10] *Saco River Cellular, Inc. v. FCC*, No. 91-1248, *et al.* (D.C. Cir. Sept. 16, 1993) (construing motion for stay as petition for writ of mandamus and denying petition), *reh'g denied* (D.C. Cir. Nov. 24, 1993) ("Port Cell has failed to show that the Federal Communications Commission clearly usurped its power when it declined to consider Port Cell's untimely petition for reconsideration containing the Paperwork Reduction Act argument."). Port Cell aso unsuccessfully raised PRA arguments in *Portland Cellular Partnership v. United States*, Civ. Act. No. 94-61P-C (D. Me. June 6, 1994), *appeal voluntarily dismissed*, No. 94-1743 (1st Cir. July 28, 1994), in which the court dismissed for lack of jurisdiction Port Cell's motion for preliminary injunction seeking to enjoin on PRA grounds the Commission's termination of Port Cell's interim operation of the Portland cellular system.

Port Cell IV in the D.C. Circuit.[11] The court denied Port Cell's motion for stay and dismissed its petition for review as "incurably premature." *Saco River Cellular, Inc. v. FCC*, Nos. 91-1248, *et al.* (D.C. Cir. Sept. 16, 1994), *reh'g denied* (D.C. Cir. Dec. 9, 1994).

9. Two requests are before us: (1) a petition for reconsideration filed by Port Cell on July 2, 1993, requesting that Northeast's license be rescinded and that Northeast's application be designated for hearing on real-party-in-interest grounds; and (2) a motion for reinstatement filed by Port Cell on October 11, 1995, requesting that, under the Paperwork Reduction Act of 1995 ("PRA of 1995"),[12] Port Cell's application be reinstated and granted because the Commission did not receive prior approval from the Office of Management and Budget ("OMB") under the PRA for the firm financial commitment requirement that served as the basis for dismissal of Port Cell's application. In particular, Port Cell argued that new Section 3512 of the PRA of 1995 requires the Commission to consider its arguments even if they are otherwise untimely. Various responsive and additional pleadings and letters have been filed.[13] In addition, the

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[11] *Portland Cellular Partnership v. FCC*, No. 94-1500 (D.C. Cir. filed July 7, 1994). The court consolidated the appeal with the pending appeal in *Saco River*.

[12] Pub. L. No. 104-13, 109 Stat. 163 (1995), *amending and recodifying* 44 U.S.C. §§ 3501-3520.

[13] The litigiousness of the parties in this proceeding has been staggering, and has unnecessarily complicated and prolonged this proceeding. Many of the pleadings and letters before us are unauthorized. Nevertheless, in order to avoid further disputes over our decision, even if not specifically referenced, we have reviewed the entire record filed prior to September 15, 1996, and we address all relevant arguments filed up to that date. We have not reviewed materials filed after September 15, 1996, because, if we did not impose a cut-off on reviewing unauthorized pleadings, given the litigiousness of the parties, resolution of this case would be even further delayed.

General Counsel requested the Office of Legal Counsel of the Department of Justice ("OLC") to provide its views on the proper interpretation of Section 3512 because of the "broad implications" of the issues raised in the proceeding, and because "the PRA is not within the Commission's core expertise."[14] OLC declined to provide an opinion based on its policy of not providing advice in the context of a pending adjudicatory proceeding.[15]

III. DISCUSSION

A. Propriety of Considering Port Cell's Arguments

10. We turn first to Port Cell's reinstatement request because our resolution of that request may moot Port Cell's reconsideration petition. As noted above, we have twice rejected as untimely Port Cell's attempts to raise PRA issues. The threshold issue before us is thus whether, as argued by Port Cell, passage of the PRA of 1995, which amended the prior PRA, requires us now to consider its arguments of alleged violations of the PRA. For the reasons discussed below, although we recognize the strong policy reasons not to do so, we conclude that, under the PRA of 1995, we are indeed required to consider Port Cell's PRA arguments at this late stage of the proceeding.

11. Prior to 1995, the "public protection" provision of the PRA, 44 U.S.C. § 3512, provided:

> Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved . . . does not

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[14] Letter from General Counsel William E. Kennard to Assistant Attorney General Walter Dellinger, OLC (Apr. 29, 1996).

[15] Letter from Deputy Assistant Attorney General Richard L. Shiffrin, OLC, to General Counsel Kennard (June 27, 1996).

> display a current control number assigned by the Director [of OMB].

12. Under this section, if an agency promulgates an information collection without OMB approval, "members of the public may ignore it without risk of penalty." *Dole v. United Steelworkers of America*, 494 U.S. 26, 40 (1990). The pre-1995 version of the PRA did not specifically indicate that Congress intended this "public protection" provision to override provisions of other statutes (or prudential considerations) requiring that arguments be raised in an administrative or judicial proceeding in a timely fashion, or to override the instructions to an agency in a judicial remand. Accordingly, in our prior decision, we took the view that PRA arguments need not be addressed if they were untimely under Section 405(a) of the Communications Act, 47 U.S.C. § 405(a),[16] especially where consideration would be inconsistent with the instructions of a court in a remand order. *See Port Cell IV*, 9 FCC Rcd at 3291-92 & n.3.

13. As Port Cell points out, however, the PRA of 1995 contains significant new language relevant to the timeliness of PRA arguments. After re-phrasing the prior Section 3512 as a new Secton 3512(a), Congress added the following new Section 3512(b) (emphasis added):

> The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise *at any time during the administrative process or judicial action applicable thereto.*

14. The legislative history of this provision reinforces the clear statutory language. Senator Roth, Chairman of the Senate Governmental Affairs Committee and co-sponsor of the PRA of 1995 in the Senate, observed

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[16] Section 405(a) provides, in pertinent part: "A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of."

> that the protection of Section 3512 may be raised at any time during the life of the matter. The protection cannot be waived. Failure to raise them at an early stage does not preclude later assertion of rights under this section, regardless of any agency or judicial rules to the contrary.

141 CONG. REC. S5274-75 (Apr. 6, 1995). *See also* 141 CONG. REC. H4376 (Apr. 6, 1995) (statement of Rep. Clinger) (public protection provision permits the defense to be raised "at any time in an ongoing dispute").

15. Northeast argues that despite the "at any time" language of Section 3512(b), a PRA issue may still not be raised if raising it would be untimely under another statutory provision. Its basis for this argument is that while Section 3512(a) is prefaced by the phrase "notwithstanding any other provision of law," Section 3512(b) contains no such language. We find this argument unpersuasive. The provision that a PRA issue may be raised "at any time" would be rendered meaningless if the phrase "except as otherwise provided by law or judicial order" was engrafted onto that section. In any event, to the extent ambiguity exists on this point, the legislative history quoted above resolves it decisively. In light of the fact that the statute permits PRA issues to be raised "at any time" in an administrative or judicial proceeding, Northeast's arguments that consideration of the PRA arguments now would be inconsistent with Sections 402(h)[17] and 405(a) of the Communications Act are unavailing. Sec-

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[17] Section 402(h) provides,

> In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

tions 3512(b) simply trumps Section 405(a) and, to the extent it might be relevant, Section 402(h).

16. We do not agree with Northeast that Port Cell is raising its PRA defense outside of the administrative process. Port Cell's petition for reconsideration is still pending before us, and therefore the administrative process for licensing and operating the cellular system to serve the Portland NECMA is ongoing.[18] Consequently, Port Cell's motion raising Section 3512 relates to an on-going administrative process. Northeast complains that interpreting Section 3512(b) in this manner "creates absolute administrative and judicial chaos and anarchy." But as the legislative history quoted above indicates, Congress deliberately devised a remedy enabling the public to raise PRA violations without limitation, so long as the administrative or judicial process in connection with a particular license or with a particular application continues.

17. The next question we must address is whether the new Section 3512(b) applies to cases pending at the time of the October 1, 1995, general effective date of the PRA of 1995.[19] While the statute itself does not explicitly address this question, the legislative history does, and makes clear that the new Section 3512(b) applies to pending cases. Specifically, when the House of Representatives adopted the Conference Report on the PRA of 1995, Representative Crapo, the original sponsor of Section 3512(b), asked, "is it the chairman's understanding that section 3512 will become effective as of October 1, 1995, and will apply to all cases then pending before the Federal agencies or the courts?" Representative Clinger, the floor manager for the PRA of 1995 in the House, replied, "Mr. Speaker, the gentleman is absolutely correct. As of October 1,

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[18] Indeed, for this reason, the D.C. Circuit found Port Cell's appeal to be premature. *See* paragraph 8, *supra*.

[19] Pub. L. No. 104-13, § 4(a), 109 Stat. 185 (1995), *reprinted in* 44 U.S.C.A. § 3501 Historical and Statutory Notes ("Section 4(a)").

1995, the defense provided in section 3512 is available at any time in an ongoing dispute." [20]

18. Northeast nevertheless argues that Section 3512(b) is not effective as to this case because Section 4(c) of the PRA of 1995 permits information collections already approved by OMB and displaying a valid OMB control number to remain in effect until the collection was renewed or revised.[21] On its face, this provision has nothing to do with the issue of whether a party in a pending case can now raise at any time in the proceeding an argument that the agency illegally imposed a penalty on it for failing to comply with an unapproved information collection. Northeast claims the firm financial commitment requirement has a current control number, and, therefore, pursuant to Section 4(c), the PRA of 1995 is not effective as to Port Cell's case. We fail to see how that relates to the question of whether Port Cell can argue now that the requirements lacked a valid OMB control number at the time Port Cell failed to comply with the rule. Surely an agency cannot penalize someone for violating an information collection that lacked OMB approval at the time the information submission was required but that got OMB approval later. The legislative history quoted above confirms that Congress intended Section 3512 to go into effect at the same time as the PRA of 1995 generally went into effect, and that it should apply to proceedings that are pending on the effective date.

19. Our decision here does not impermissibly retroactively apply Section 3512 to Port Cell's aplication. Section 3512 simply applies a new procedural or jurisdictional rule; it permits the defense that the PRA was violated be raised "at any time." Changes in procedural or jurisdictional rules generally do not raise concerns about

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[20] 141 CONG. REC. H4376 (Apr. 6, 1995) (statements of Reps. Crapo and Clinger).

[21] Pub. L. No. 104-13, § 4(c), 109 Stat. 185 (1995), *reprinted in* 44 U.S.C.A. § 3501 Historical and Statutory Notes.

retroactivity. *See Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1502 (1994). Even if Section 3512 raised concerns of retroactivity, because of the "clear evidence of congressional intent" that it "should apply to cases arising before its enactment," any potential concerns about impermissible retroactivity are eliminated. *Id.* at 1491-93, 1496. *See also Scheidemann v. INS*, 83 F.3d 1517, 1521 (3d Cir. 1996) ("a court may determine congressional intent [of retroactivity] . . . from the statute's legislative history."). Thus we conclude that Section 3512 may validly be applied to Port Cell.

20. We next consider whether Section 402(h) of the Communications Act, 47 U.S.C. § 402(h), or the court's remand in *Northeast Cellular* precludes our consideration of Port Cell's PRA arguments. The court vacated our waiver of the financial qualification requirements for Port Cell and remanded the proceeding to us, and Section 402(h) requires us to give effect to the court's mandate. We are not waiving the financial qualification requirements for cellular licensees in contravention of the court's mandate. Instead, we are considering whether the financial qualification requirement regulation is valid and enforceable under the PRA. Section 402(h) does not restrict us from doing so. In any event, Section 3512 of the PRA prevents Port Cell from being penalized "notwithstanding any other law," and permits Port Cell to raise a violation of the PRA "at any time during the administrative process or judicial action." It thus overrides any restriction Section 402(h) might place on our consideration of PRA issues in a proceeding on remand from a court.

21. We also reject Northeast's argument that we may not grant the relief sought by Port Cell because to do so would nullify the judgment of *Northeast Cellular*, contrary to the constitutional separation of powers doctrine articulated in *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995) ("*Plaut*"). In *Plaut*, the Supreme Court held unconstitutional Section 27A(b) of the Securities Exchange Act, 15 U.S.C. § 78aa-1(b), which required reinstatement

of cases previously dismissed by the courts because the Congress retroactively commanded reopening final judgments. This case is fundamentally different. In *Plaut*, the judicial proceedings had been dismissed; there was no remand and continuing administrative proceeding that would be subject to further judicial review. *Id.* at 1451. Here, the judgment in *Northeast Cellular* vacated the Commission's waiver of financial qualification requirements and remanded the case to the agency for a further decision that could be judicially reviewed. Further administrative proceedings ensued, and the Commission's dismissal of Port Cell's application is still subject to judicial review. The statute addressed in *Plaut* by its terms applied to cases that were final. Section 3512 by its terms applies only to cases in which the administrative or judicial processes are still pending.

22. In sum, we conclude that Port Cell may properly raise the PRA issue and invoke the provisions of Secton 3512.

B. OMB Approval of Section 22.917(b)

23. It is not disputed that the FCC had not obtained OMB approval for Section 22.917(b) at the time that Port Cell filed its application. Thus, unless no OMB approval was required, Port Cell cannot be penalized for its failure to comply with Section 22.917(b).

24. Section 22.917(b) required tentative cellular service selectees to provide us with evidence of a firm financial commitment. This requirement is an information collection under the PRA, yet no OMB approval was obtained for the version of Section 22.917(b) in effect before or at the time Port Cell's application was filed. In *Dana* and its progeny, we concluded that PRA review was required for financial qualification requirements in analogous regulations.[22] Similarly, Section 22.917(b) re-

[22] *Dana Communications, Ltd.*, 7 FCC Rcd 1878 (1992) ("*Dana*") (PRA approval by OMB for former Section 22.917(c) governing

quired PRA review by OMB. Northeast's arguments to the contrary lack merit. It does not matter that Section 22.917(b) was adopted in a rulemaking proceeding without notice and comment.[23] The PRA requires OMB clearance for all information collections, whether promulgated with or without a notice and comment rulemaking proceeding.[24] OMB's interpretations of the PRA, which are entitled to deference,[25] confirm that its "paperwork control functions necessarily extend to all reporting and recordkeeping requirements, however imposed."[26] Nor does Congress' use of the terms information collection "requests" and requirements" in the 1980 PRA support Northeast's position. OMB's interpretation of the PRA confirms that the use of the terms "request" and "requirement" in the 1980 PRA was meant only to distinguish between information collections contained in notice and comment rulemaking proceedings, and all other information collections, and that in either instance OMB clearance was required.[27] In sum, Section 22.917(b) required PRA review by OMB.

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financial showings required but not obtained); *Kent S. Foster*, 7 FCC Rcd 7971, 7972 (1992) (*"Foster"*) (same); *Fair Oaks Cellular Partners*, 10 FCC Rcd 9980 (1995) (*"Fair Oaks"*) (same).

[23] *See Cellular Lottery Rulemaking*, 59 R.R.2d 407, 415 n.37 (1985).

[24] 44 U.S.C. 3504(h) (OMB clearance required for information collections promulgated in notice and comment rulemaking proceedings); 44 U.S.C. 3507 (OMB clearance required for all other information collections); 5 C.F.R. §§ 1302.3, 1320.4(a) (1983) (OMB rules implementing the PRA, indicating review required for all information collections regardless of how promulgated).

[25] OMB's interpretation is entitled to deference, as Congress has vested it with oversight of the PRA. *See* 44 U.S.C. §§ 3503, 3504(c).

[26] *Controlling Paperwork Burdens on the Public*, 47 Fed. Reg. 39515, 39517 (1982) (decision on proposed rules implementing the 1980 PRA). *See also id.* at 39516 and 39519; *Controlling Paperwork Burdens on the Public*, 48 Fed. Reg. 13666, 13668, 13680, 13681 (1983) (*"Final PRA Rules"*) (decision on final rules implementing 1980 PRA).

[27] *Final PRA Rules*, 48 Fed. Reg. at 13676.

25. Port Cell's financial qualification submission failed to set out the terms of the loan commitment, or submit evidence of the lender's determination that it had assessed the credit worthiness of the loan applicant, as required by Section 22.917(b). *Port Cell II*, 6 FCC Rcd at 2283. Accordingly, its application was dismissed. *Id.* at 2283-84. At the time of Port Cell's application, the financial qualification information collection had not been submitted to OMB for approval, and had not received OMB clearance or an OMB control number. Under Section 3512(a), Port Cell cannot be penalized for failing to comply with Section 22.917(b). The dismissal of its application is the sort of "penalty" precluded by Section 3512. *See* 44 U.S.C. § 3502(14); 5 C.F.R. § 1320.3(j) (1995).

26. There is no merit to Northeast's argument that Port Cell cannot be deemed to have "failed to comply" with the information collection because it filed financial commitment information pursuant to Section 22.917(b). Port Cell's financial commitment filing was incomplete because it failed to provide all of the evidence required by the regulation. It "failed to comply" with the requirements of the information collection, and thus Section 3512 is available as a defense. We similarly interpreted Section 3512 in *Dana, Foster*, and *Fair Oaks*. In those proceedings, as in Port Cell's case, we failed to obtain OMB clearance for the financial qualifications information collection, and the applications were dismissed because the applicants made financial showings but failed to establish adequate firm financial commitments to fund their proposed operations. Based on Section 3512, we reinstated those applications. Port Cell is entitled to no less.

27. In sum, Section 22.917(b) required OMB approval under the PRA, but at the time of Port Cell's application, such approval had not been received. Port Cell cannot be penalized for failing to comply with the firm financial commitment requirements. Its application should thus not be dismissed for this reason.

C. Port Cell's Qualifications

1. *Financial Qualifications*

28. Pursuant to OMB's regulations implementing the PRA, Port Cell has submitted an amendment to the financial portion of its application. Where an information collection requirement lacks required OMB approval, we must permit the applicant to provide or satisfy the legal conditions in any reasonable manner. 5 C.F.R. § 1320.5(b).[28] Northeast does not oppose the amendment or argue that it is insufficient. We accept Port Cell's amendment to its application, conclude that it meets the requirements of former Section 22.917(b), and find Port Cell to be financially qualified to be granted the license to serve the Portland NECMA.

2. *Ex Parte Allegations*

29. Northeast argues that Port Cell solicited an improper ex parte communication in violation of 47 C.F.R. § 1.1210, and thus is not qualified to be a licensee even if its application is reinstated and Port Cell is now found to meet the financial showing requirements. This allegation arises from Port Cell's correspondence with Senator William S. Cohen. On December 21, 1994, Port Cell's counsel wrote Senator Cohen to "bring to your attention a very troubling matter . . ."[29] After summarizing the facts of this case involving the PRA issue, the letter stated (*id.*):

> The FCC's refusal to address the issue of PRA compliance is patently unfair to PortCell, which had a growing business valued at over $30 million dollars, and which has operated in full compliance with FCC

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[28] *See also Fair Oaks*, 10 FCC Rcd at 9982 & n.25; *Foster*, 7 FCC Rcd at 7972 n.10; *Dana*, 7 FCC Rcd at 1879.

[29] Letter from L. Andrew Tollin and William H. Boger to United States Senator William S. Cohen (Dec. 21, 1994).

> rules and policies. This is a clear case where an agency of the Federal government has ignored the intent of Congress in enacting the PRA. Furthermore, whatever questions the FCC might have had about PortCell's financial resources have been answered by its success as a growing concern over the last six years.
>
> We would appreciate a chance to discuss this situation with you and will call your office to arrange a convenient time.

30. Attached to the letter was a "Fact Sheet" further elaborating on the facts of the case and concluding:

> The FCC has thus terminated an operating business without confronting the question of whether such action is consistent with the PRA. In contrast to its actions in virtually every other case where it has discovered a PRA problem, PortCell has been forced off the air. The court has postponed PortCell's day in court indefinitely, leaving PortCell with little recourse but to seek Congressional help.

31. There is no indication that a meeting between Port Cell and Senator Cohen's office was ever arranged. Instead, on January 24, 1995, Senator Cohen forwarded Port Cell's letter to Chairman Hundt with a cover letter stating in part:

> Because of my desire to be responsive to all inquiries and communications, I would appreciate your consideration of the enclosed letter. I am particularly interested in your focusing on [Port Cell's counsel's] question as to whether the FCC complied with the Paperwork Reduction Act in adopting certain regulations.[30]

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[30] Letter from Senator Cohen to Chairman Reed E. Hundt (Jan. 24, 1995).

32. Senator Cohen also wrote to Port Cell indicating in pertinent part:

> In order to be of assistance to your client [*i.e.*, Port Cell], I recently sent a letter to Reed Hundt, the Chairman of the FCC, to urge his prompt consideration of the matter, particularly focusing on your question as to whether the FCC complied with the Paperwork Reduction Act in adopting certain regulations.[31]

33. Because the letter from Senator Cohen to Chairman Hundt was not served on Northeast, and because it addressed the merits of the proceeding, it was an ex parte presentation. The Commission's Acting Secretary notified all parties of the correspondence, placed all of the correspondence in the public file, and informed the Senator that this was a restricted proceeding (in which ex parte presentations are prohibited).[32]

34. On July 12, 1996, the General Counsel and the Chief, Wireless Telecommunications Bureau, believing that further information regarding the circumstances of the correspondence might clarify matters, wrote to Port Cell seeking additional information on this issue.[33] Port Cell provided declarations by its attorneys and principals in response. These declarations stated in essence that Port Cell's principals had authorized the correspondence on the advice of counsel because Senator Cohen's committee would have jurisdiction over any legislation involving the PRA. Port Cell's attorney stated: ". . . I believed clarify-

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[31] Letter from Senator Cohen to L. Andrew Tollin and William H. Boger (Jan. 27, 1995).

[32] Letter from Acting Secretary William F. Caton to Senator Cohen (Mar. 2, 1995). *See* 47 C.F.R. § 1.1208.

[33] Letter from General Counsel Kennard and Michele Farquhar, Chief, Wireless Telecommunications Bureau to L. Andrew Tollin (Jul. 12, 1996).

ing the remedial effect of the PRA through legislation was worth exploring."[34] They indicate that they intended to seek a meeting with Senator Cohen, deny that any other contacts with the Senator occurred, and state that they had no intention that Senator Cohen should intervene with the Commission or knowledge that he intended to do so.

35. Northeast asserts that Port Cell failed to answer completely the questions posed concerning contacts with Senator Cohen's office, leaving many questions unanswered. Northeast questions, for example, (1) why, if Port Cell intended to meet with Senator Cohen, no meeting was ever set up, and (2) why, after Port Cell discovered that Senator Cohen had contacted the Commission, it did not immediately notify the Commission and the other parties. Port Cell then provided further declarations from its principals and attorneys. These declarations indicate that during the holiday period Port Cell decided to let some time pass before following up its letter to Senator Cohen. The declarations also indicate that it did not serve Senator Cohen's letter on the other parties because it was not required to and that no harm was done because the Managing Director served the other parties.

36. The issue before us is whether Northeast has made a prima facie showing that Port Cell "solicited" or "encouraged" Senator Cohen to make an ex parte presentation to the Commission, in violation of 47 C.F.R. § 1.1210, and, in view of Port Cell's response, whether the evidence as a whole raises a substantial and material question of fact as to whether Port Cell solicited or encouraged such a presentation. *See Astroline Communications Company, Limited Partnership v. FCC*, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988) (discussing the relevant standard). As Port Cell observes, the letter to Senator Cohen does not on its face ask the Senator to make a presentation to the Commission regarding Port Cell's application. Rather, it

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[34] Declaration of L. Andrew Tollin (Jul. 26, 1996) at ¶ 3.

specifically asks for "a chance to discuss this situation with you." Sworn declarations by Port Cell's principals, who authorized the letter, and Port Cell's attorneys, who drafted it, confirm that the language quoted reflects their true intention in writing to the Senator—to seek a meeting regarding Congressional help through legislation. There is no direct evidence before us tending to refute either the plain language of the letter or the sworn declarations of the principals. Moreover, although Senator Cohen's action in referring a constituent's inquiry to the relevant government agency might not be wholly surprising in light of customary congressional practice, we cannot say that it is circumstantially improbable that a constituent asking for a meeting with an elected representative actually wants one, even if the constituent ultimately does not follow up on its desire for such a meeting. In addition, we agree with Port Cell that once it learned of Senator Cohen's letter, it was not required to serve the letter on the other parties. Nor was Port Cell required to notify the Commission of the letter.

37. This case, thus, differs from, for example, *Elkhart Telephone Co.*, 11 FCC Rcd 1165 (1996), in which a party requested Senator Kassebaum to seek expedition of a Commission proceeding, but included with this request a draft letter from the Senator to the Commission addressing the merits. The presence of the draft letter provided specific support for the inference that the party intended to suggest to the Senator that such a letter be sent, although the party did not explicitly request the Senator to do so. Here, by contrast, there is no such specific support for the allegation that Port Cell's letter was intended to provoke Senator Cohen's presentation to the Commission. There is only the speculation that Port Cell's actions could be so interpreted. Mere speculation, however, is insufficient to raise a substantial and material question of fact. *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 772-73 (D.C. Cir. 1981); *Fox Television Stations, Inc.*, 10 FCC

Rcd 8452, 8512 ¶ 147 (1995), *recon. denied*, 11 FCC Rcd 7773 (1996).

38. That having been said, it would nevertheless be preferable for parties communicating with their representatives about pending restricted proceedings to specifically inform them of the restricted ex parte status of the proceeding and the prohibition on ex parte presentations, thereby avoiding even inadvertently instigating an inappropriate solicitation. We strongly advise that in the future parties follow this practice.

3. *Abuse of Process Allegations*

39. Northeast also challenges Port Cell's fitness to be a licensee based on allegations that Port Cell offered to withhold from the Commission information concerning Northeast's qualifications to be a licensee if Northeast would settle this proceeding. Port Cell wrote to Northeast indicating that Port Cell's lawyers had prepared a memorandum that was "very destructive of the ability of Northeast to qualify for the license." The memorandum concerned evidence intended to provide further support for Port Cell's allegations to the Commission that Northeast lacked reasonable assurance of the availability of its transmitter site. Port Cell stated that it had instructed its lawyers not to file the evidence at the time and instead suggested a meeting.[35] Northeast responded by informing Port Cell that "such threats are inappropriate and contrary to Commission policy . . . ."[36] Port Cell subsequently filed the information with the Commission, and disclosed the correspondence. In *Port Cell III*, 8 FCC Rcd at 4149 n.18, the Commission denied the relief sought by Port Cell based on the information in question.

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[35] Letter from John W. Connor to Timothy Hutchison (Sept. 19, 1991).

[36] Letter from Timothy D. Hutchison to John W. Connor (Oct. 18, 1991), *attaching* letter from Alan Y. Naftalin to Timothy D. Hutchison (Oct. 18, 1991).

40. Abuse of process occurs when an improper threat is made to divulge information and invoke the Commission's processes unless another party accedes to some demands.[37] It does not include the "threat" implicit in any failed settlement negotiation that, in the absence of a settlement, litigation will continue.[38] Here, Port Cell merely indicated that it possessed evidence that would lead to successful litigation if no settlement was reached. This is more comparable to *Spanish International*,[39] where the parties simply indicated they would continue to litigate the pending case, than *Gulf Coast*, where a party made improper threats that were not 'on any theory a legitimate part of the settlement negotiations."[40] We do not believe that Port Cell's behavior in the settlement context involved any improper threat, and it raises no substantial and material questions regarding Port Cell's qualifications.

41. Accordingly, for the reasons stated above, we find Port Cell fully qualified to be a licensee. We rescind the grant of the Block B Portland, Maine, cellular market to Northeast, and grant Port Cell's application.

D. Interim Operating Authority

42. When we rescinded Port Cell's original authorization, we granted it interim operating authority until Northeast was ready to begin providing service. *Port Cell III*, 8 FCC Rcd at 4152, *modifying Port Cell II*, 6 FCC Rcd at 2284 (originally granting interim operating authority for six months).[41] As we noted then, the public interest

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[37] *E.g., Gulf Coast Communications, Inc.*, 81 F.C.C. 2d 499, 513 (Rev. Bd. 1981) (*"Gulf Coast"*), *recon. denied*, 88 F.C.C.2d 1033 (Rev. Bd. 1981), *rev. denied*, FCC 82-168 (Apr. 16, 1982).

[38] *Spanish International Communications Corp.*, 1 FCC Rcd 92, 95 n.1 (Rev. Bd. 1986) (*"Spanish International"*) (subsequent history omitted).

[39] *Id.*

[40] *Gulf Coast* at 513.

[41] *See also, e.g., La Star Cellular Telephone Co. v. FCC*, 899 F.2d 1233 (D.C. Cir. 1990).

requires interim service in this case in order to maintain a healthy competitive market in Portland and to continue uninterrupted service to Northeast's customers. *Port Cell II*, 6 FCC Rcd at 2284. Port Cell asks that Northeast be allowed to continue service on an interim basis but cease service on ten days' notice from Port Cell that Port Cell will recommence operations. We believe this approach best serves the public interest. Accordingly, pursuant to Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), we will grant Northeast interim operating authority and permit it to continue service until ten days after Port Cell notifies Northeast and the Commission that it is ready to recommence service.

E. Northeast's Qualifications

43. In light of our decision to reinstate and grant Port Cell's application, we need not address here the real-party-in-interest questions raised against Northeast. We will dismiss Port Cell's petition for reconsideration and related pleadings on this issue.

IV. ORDERING CLAUSES

44. IT IS ORDERED that leave for Portland Cellular Partnership and Northeast Cellular Telephone Co., L.P., to file any unauthorized or unrequested pleadings in this proceedings IS GRANTED, and Portland Cellular Partnership's motion to strike IS DENIED.

45. IT IS FURTHER ORDERED that Northeast Cellular Telephone Company's license to construct and operate a cellular system on Frequency B in the domestic public cellular radio telecommunications service to serve Portland, Maine, IS RESCINDED.

46. IT IS FURTHER ORDERED that the application of Portland Cellular Partnership to operate the Portland, Maine, cellular system IS REINSTATED *NUNC PRO TUNC*, Portland Cellular Partnership's amendment IS ACCEPTED, and the application, as amended, IS GRANTED.

47. IT IS FURTHER ORDERED that Northeast Cellular Telephone Company, L.P., IS GRANTED interim operating authority to operate the Portland, Maine, cellular system until ten days after Portland Cellular Partnership serves notice on Northeast Cellular Telephone Company and the Commission that it is ready to recommence operations.

48. IT IS FURTHER ORDERED that the Petition for Reconsideration, filed July 2, 1993, by Portland Cellular Partnership, and the Motion for Leave to File and Motion to Set Aside Grant and Designate for Hearing, filed March 10, 1994, by Portland Cellular Partnership, ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM F. CATON
Acting Secretary

APPENDIX F

CONSTITUTIONAL AND STATUTORY APPENDIX

1. Article III of the U.S. Constitution provides, in pertinent part:

> The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const. art. III, § 1.

2. Section 405(a) of title 47 of the United States Code provides:

> A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of.

47 U.S.C. § 405(a).

3. Section 402(h) of title 47 of the United States Code provides:

> In the event that the court [to which an FCC order is appealed] shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

47 U.S.C. § 402(h).

4. Section 402(j) of title 47 of the United States Code provides:

> The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

47 U.S.C. § 402(j).

5. The Paperwork Reduction Act Amendments of 1995, 44 U.S.C. § 3512, provides as follows:

> (a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this chapter [the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.*] if
>
> (1) the collection of information does not display a valid control number assigned by the Director [of the Office of Management and Budget] in accordance with this chapter; . . .
>
> * * *
>
> (b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.

Id. § 3512 (enacted on May 22, 1995 as Pub. L. No. 104-13, § 2).

FILED
JUL 15 1998
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SUPREME COURT, U.S.

(2)

No. 97-1838

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

NORTHEAST CELLULAR TELEPHONE COMPANY, L.P.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, PORTLAND CELLULAR PARTNERSHIP, SACO RIVER CELLULAR, INC.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT REQUIRED BY RULE 29.6

Portland Cellular Partnership ("PortCell") is a general partnership engaged in the cellular radiotelephone business operating in Androscoggin County, Maine. There are three general partners: Lewiston Auburn Cellular, Inc. ("Lewiston"), Seacoast Cellular, Inc. ("Seacoast"), and NYNEX Mobile Communications Company ("NYNEX Mobile").

Lewiston has not issued shares to the public. One-third of Lewiston stock is held by CommNet Cellular, Inc., whose shares are publicly traded, and two-thirds of Lewiston stock is held by Community Cellular Telecommunications, which has not issued shares to the public. Community Service Communications, Inc., the parent of Community Cellular Telecommunications, has issued shares to the public.

Seacoast is a wholly-owned subsidiary of Utilities, Inc. ("Utilities") and is not publicly traded. 78% of Utilities' stock is held by its Chairman and CEO, George Twombly and/or his immediate family members. ROTELCOM, Inc., a subsidiary of Frontier Corporation, whose shares are issued to the public, owns an additional 16% of the outstanding stock of Utilities, with the remaining shares owned by eighteen other stockholders, none of whose shares are issued to the public.

NYNEX Mobile is not publicly traded. It is an indirect wholly owned subsidiary of Bell Atlantic Corporation, a publicly traded corporation that has equity securities in the hands of the public.

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IN THE SUPREME COURT OF THE UNITED STATES
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NORTHEAST CELLULAR TELEPHONE COMPANY, L.P.,
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v.

FEDERAL COMMUNICATIONS COMMISSION, PORTLAND CELLULAR PARTNERSHIP, SACO RIVER CELLULAR, INC.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Portland Cellular Partnership ("PortCell") hereby opposes the petition for a writ of certiorari filed by Northeast Cellular Telephone Company, L.P. ("Northeast"). This case involves an agency's admitted violation of a preexisting statutory obligation and its correction of that violation while the case was ongoing. The FCC took this corrective action after Congress passed legislation expressly requiring agencies and courts to correct violations of the statute at any time during an ongoing case. Northeast tries to portray the FCC's compliance with this Congressional mandate as somehow being impermissibly retroactive. This issue is not even colorably presented here. The FCC's action was compelled by preexisting law, as well as by the new legislation. Clearly, when

Congress requires agencies to comply with preexisting law in pending cases, it is not acting retroactively.

OPINIONS BELOW

PortCell appends hereto two additional, earlier opinions of the FCC that were omitted from the Petitioner's Appendix: *Portland Cellular Partnership,* 9 F.C.C.R. 3291 (1994) (PortCell App. 1a) and *Portland Cellular Partnership,* 8 F.C.C.R. 4146 (1993) (PortCell App. 9a). These decisions were reversed by the Commission in the decision under review.

STATEMENT OF THE CASE

This case stems from the FCC's violation of the 1980 Paperwork Reduction Act ("PRA").[1] That Act required Office of Management and Budget ("OMB") clearance of certain rules requiring the collection or submission of information to the government. The Public Protection Provision of the statute made such rules unenforceable if they were uncleared by prohibiting the imposition of penalties for not complying with an uncleared rule. That provision stated:

> *Notwithstanding any other provision of law,* no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request . . . does not display a current control number assigned by [OMB].

44 U.S.C. § 3512 (1980) (emphasis added).

In 1986, the FCC promulgated a financial filing rule without submitting it to OMB for review and obtaining the required control number, thus violating the PRA. The rule was, there-

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[1] 44 U.S.C. § 3501 *et seq.* (1980).

fore, unenforceable as a threshold matter.[2] Later that year, PortCell made a filing under this rule, believing it was subject to the rule, not realizing the FCC had not complied with the PRA. Initially, the FCC found PortCell had satisfied the rule. Later, the FCC changed its mind and found the filing deficient, but nevertheless waived the rule and granted PortCell the Portland, Maine cellular license. PortCell proceeded to finance and construct the system, which went on the air in 1987. In 1990, however, the court of appeals vacated and remanded the FCC's waiver decision for a new decision. The PRA violation had still not been discovered.

In 1991, after the remand, the FCC refused to re-waive the rule, rescinded PortCell's license, and denied its application. This action constituted a penalty prohibited by the Public Protection Provision, further violating the PRA. While the case remained pending on reconsideration and appeal,[3] PortCell discovered the FCC's failure to comply with the PRA and sought reinstatement based on the "[n]otwithstanding any other provision of law . . . [no] penalty" language in the Public Protection Provision.[4]

From 1992 through 1995, the FCC refused to consider whether it had violated the PRA. At first, it claimed it had no power to consider the claim, based on the thirty-day limitation on petitions for reconsideration in 47 U.S.C. § 405(a), completely ignoring the Public Protection Provision's "[n]otwithstanding any other provision of law" override clause. (PortCell App. 11a n.4.) Later, the Commission recognized that

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2 *See Dole v. United Steelworkers*, 494 U.S. 26, 40 (1990).

3 PortCell timely appealed the denial to the D.C. Circuit, but its appeal was held in abeyance because a timely petition for reconsideration was also filed by another party.

4 PortCell's reinstatement request was filed after the normal 30-day limit for filing petitions for reconsideration, but while a timely petition for reconsideration was pending.

it did have the discretion to review its noncompliance with preexisting law, but still refused to consider PortCell's PRA contentions because of the late stage of the proceeding. (PortCell App. 3a-6a.) Again, the FCC ignored the PRA's sweeping override of all other laws.

In 1995, the case was still ongoing at the FCC, and thus there had been no opportunity for judicial review of the agency's refusal to address its PRA noncompliance. In that year, Congress recodified the entire PRA and left unchanged the "[n]otwithstanding . . . [no] penalty" protections in the Public Protection Provision. As part of this rewrite, Congress made explicit what was already implicit in this provision—that complete protection was available "at any time" while a case remained ongoing.

PortCell brought this legislative revision to the FCC's attention and sought relief yet again. Only then did the agency finally agree that it was compelled to address the PRA issue. In late 1996, it admitted that its rule had not been cleared and that the license denial violated the statute. It prospectively remedied the penalty it had imposed on PortCell by reinstating PortCell's application and granting it the license. (Pet. App. 24a.)

In January 1998, the court of appeals unanimously affirmed, and in March it denied rehearing and *en banc* review. (Pet. App. 1a, 20a, 22a.) The court found that the FCC's address of the PRA (pursuant to the amendment) in no way interfered with its previous remand. The court also found that the "[n]otwithstanding any other provision of law" language in both the earlier and new PRA trumped any obstacles to the FCC's address of the matter. Finally, the court found that the amendment did not operate retroactively because it merely directed agencies to review their violations of the preexisting law in the course of ongoing litigation.

REASONS FOR NOT GRANTING THE WRIT

I. THIS CASE DOES NOT PRESENT THE ISSUES FRAMED IN NORTHEAST'S PETITION

Northeast does *not* here take issue with the FCC's and the court of appeals' determination that the penalty imposed on PortCell by the FCC violated preexisting law.[5] It only challenges the FCC's *compliance* with that law. At bottom, Northeast would have this Court force the FCC to ignore its acknowledged and clear-cut violation of preexisting law, which nullifies the rule in question.

To this end, Northeast frames two issues generally relating to whether the 1995 legislation, as applied here, violates the separation of powers doctrine or is impermissibly retroactive. This case presents neither issue. Tellingly, Northeast raised neither of these questions when it sought *en banc* rehearing by the D.C. Circuit. There, it presented only a fact-bound, non-constitutional issue as being the most important issue raised by the case. In its effort to invent a constitutional issue for this Court to review, Northeast ignores the fact that the preexisting PRA compelled the same outcome.

A. Separation of Powers

The Petitioner's first question, in essence, is whether the court of appeals' remand to the FCC for a new decision[6] is a "final" judgment, which cannot be affected by subsequent legislation under the separation of powers doctrine. The court of appeals, the best judge of the scope of its prior decision, held

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[5] Under Sup. Ct. R. 14.1(a), only those issues set forth in the petition will be considered.

[6] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

that its previous vacation of the FCC's waiver of the financial rule "did not purport to resolve" whether that rule was valid under the PRA, "because no party . . . raised" the issue, and was in no sense a final judgment in the case. (Pet. App. 11a.)

Northeast nevertheless argues that the circuit court's remand decision became final under the definition of finality contained in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), which it states is, in turn, derived from *Griffith v. Kentucky*, 479 U.S. 314 (1987). The only appearance in *Plaut* of *Griffith*, however, is in the introductory section of the case, where it is cited for the unremarkable proposition that a judgment dismissing a case as time-barred becomes final when the time for appeal and certiorari has passed. 514 U.S. at 214. Simply put, finality was not an issue in *Plaut*, because the dismissal of the prior lawsuit there was incontestably final. More to the point, *Plaut* did not even touch on the finality of a remand decision.

This Court has, however, recognized that a remand by definition is not "final," whether or not it is challenged, because it leads to further proceedings below, which are in turn subject to further appellate review. *See Ford Motor Co. v. NLRB*, 305 U.S. 364, 374 (1939); *accord United States v. U.S. Smelting & Mining Co.*, 339 U.S. 186, 198 (1950). This Court has made clear that after a judicial remand—and even after denial of certiorari concerning the remand order—subsequent judicial review of the action on remand may revisit issues previously decided by the court's remand order. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 488 & n.6 (1968). Accordingly, the vacation and remand of an FCC decision is in no way a final judgment, because it necessarily anticipates a further decision on remand, which is independently subject to further judicial review.

Any FCC action after remand is constitutionally required to comport with the laws of the United States, and its compliance

is subject to review by the courts, which must in turn "'decide according to existing laws.'" *Plaut,* 514 U.S. at 227 (quoting *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801)). A court of appeals remand does not require the agency to disregard the laws of the United States that were not the subject of the remand, whether they are preexisting laws or subsequently enacted. And Congress does not intrude on the realm of the courts when it enacts legislation requiring agencies to respect the preexisting law in cases that remain nonfinal, including those on remand.[7]

B. Retroactivity

The second question presented in Northeast's petition involves retroactivity. In essence, Northeast questions whether the effect of the 1995 PRA amendments here was impermissibly retroactive. Northeast, however, ignores the preexisting statute, which was outcome-determinative. The Public Protection Provision already barred the FCC from penalizing PortCell when it denied the application in 1991. The FCC and the court of appeals held that the FCC's denial of the PortCell application violated that preexisting law.

The 1980 PRA required agencies to obtain OMB clearance and display a control number before they may compel compliance with a rule such as the financial regulation at issue here. If an agency did not comply with this requirement, the Public

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[7] Northeast attempts to create a nonexistent circuit conflict on the finality of a remand for separation of powers purposes, citing *United States v. Vazquez-Rivera,* 135 F.3d 172 (1st Cir. 1998). That case actually confirms that a remand by the court of appeals is not a final judgment in a case, because the court held its remand was final with respect to the legal issue addressed therein, but not as to the entire case. The court's discussion of the effect of subsequent legislative actions on the issue that was the subject of the remand was based on the fact that applying that legislation would have imposed a criminal sentence *ex post facto*; it was also dictum, since the court reached the same conclusion on other grounds.

Protection Provision specifically provided that "no person shall be subject to any penalty" for failure to satisfy the rule, "[n]otwithstanding any other provision of law." 44 U.S.C. § 3512 (1980). This provision of preexisting law is what rendered the FCC's denial of the PortCell application unlawful. Northeast does not contest this determination.

Thus, the case boils down to the narrow issue of when PortCell was entitled to raise the PRA violation as a defense. This is answered by the same override provision in the preexisting law. The denial of PortCell's license and the consequent grant of the license to Northeast were directly contrary to an Act of Congress that was in effect years before the applications were filed. The correction of this legal error was compelled by existing law. Any procedural bars to raising this defense, such as 47 U.S.C. §§ 402(h) and 405(a),[8] were overridden by the "[n]otwithstanding any other provision of law" language in § 3512. Indeed, the court of appeals relied on this specific language in determining that such statutory obstacles were overridden. (Pet. App. 9a.) Northeast completely ignores this language and its plain meaning.

In the absence of such procedural obstacles, the FCC was obviously obligated to comply with the preexisting law, which barred it from penalizing PortCell based on the FCC's prior clear-cut violation of the statute. If the FCC had not corrected its own error, its denial of the application would have been subject to reversal on appeal for being "otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Given that the preexisting law dictated the result here, there is clearly no retroactivity issue.

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[8] Northeast also presents argument concerning 47 U.S.C. § 402(j). This issue was never raised or addressed below and is, accordingly, not properly before this Court.

Northeast nevertheless claims that the new statute is somehow retroactive, never confronting the fact that the new statute does nothing that was not already covered by the preexisting law. The "[n]otwithstanding . . . [no] penalty" provision is carried over and recodified as § 3512(a), with minor changes not at issue here.[9] The 1995 amendments added new § 3512(b), which states:

> The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.[10]

As discussed above, PortCell was fully entitled to no penalty protection notwithstanding any other law under the preexisting law, and actively pursued it.[11] The 1995 amendment resulted in no substantive or procedural change, much less a retroactive one.

Congress made clear when it enacted the 1995 law that it was merely codifying more clearly what was already the law. Just before the House unanimously passed the statute, Rep. Crapo, the author of § 3512(b), said it was meant to—

> *end any confusion which may exist in the courts and Federal agencies about how section 3512 was originally intended to work . . . .*
>
> [T]he amendments made to section 3512 are intended to clarify that a penalty imposed by a Federal

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[9] 44 U.S.C. § 3512(a), as amended by Pub. L. No. 104-13, § 2, 109 Stat. 181 (1995).

[10] 44 U.S.C. § 3512(b), as added by Pub. L. No. 104-13, § 2, 109 Stat. 181 (1995).

[11] Northeast misstates that PortCell "waived" its PRA claim. PortCell never waived its PRA claim, and neither the court of appeals nor the FCC so held.

> agency based on failure to comply with an information request that does not bear on [sic] OMB control number is not enforceable, and *had always provided the public with the right to petition the agencies or courts for complete relief at any time during the agency or court review process to eliminate the effects of any penalty.*

141 Cong. Rec. H4376 (daily ed. Apr. 6, 1995) (emphasis added). Similarly, the House Report on the 1995 legislation states:

> The intended scope, purposes, and requirements of section 3512's current provisions on public enforcement of the Act's information collection clearance requirements are *unchanged.* The section is amended, however, for purposes of consistency and clarity . . . .[12]

Thus, the only effect of the 1995 statute here is that it made explicit what was always implicit in the Paperwork Reduction Act—that the statutory bar on imposing such penalties overrides any legal obstacle to raising the PRA defense in a case that remains pending. The new statute's unambiguous language gave the FCC no opportunity to dodge its responsibility, but it ultimately changed nothing regarding the validity *vel non* of the FCC's denial of the PortCell application.

Even if the 1995 amendment was necessary to the result reached here, there would still be no retroactivity. When Congress requires agencies to comply with preexisting law in pending cases, it is not acting retroactively. As the court of appeals put it:

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[12] H.R. Rep. No. 104-37, at 53 (1995), *reprinted in* 1995 U.S.C.C.A.N. 164, 216 (emphasis added).

> Because § 3512(b) governs only the conduct of litigation after the effective date of the statute and does nothing to reopen matters litigated before that date, it does not offend any norm against retroactive lawmaking.

(Pet. App. 10a.)

Congress fully intended the new statute's protection to be available in pending cases. As this Court has observed, "in determining a statute's temporal reach generally, our normal rules of construction apply." *Lindh v. Murphy*, 117 S. Ct. 2059, 2063 (1997). Both the plain words of the new provision, § 3512(b), and the legislative history accompanying it, support its application to pending cases.

Congress intended complete relief to be available in pending cases as of the effective date of the amendment (October 1, 1995). The government has been barred from imposing such penalties for years by the preexisting Public Protection Provision, and the new language expressly makes the defense available "at any time during the agency administrative process." There is no language even arguably excluding pending cases.

In fact, the drafters specifically stated that this new language applies to pending cases, as the following colloquy between the sponsor of § 3512(b) and the House Conference Manager shows:

> **Mr. Crapo**. I would like to ask, is it the chairman's understanding that section 3512 will become effective as of October 1, 1995, and will apply to all cases then pending before the Federal agencies or the courts?
>
> **Mr. Clinger**. Mr. Speaker, the gentleman is absolutely correct. As of October 1, 1995, the defense provided in

> section 3512 is available at any time in an ongoing dispute.

141 Cong. Rec. H4376 (daily ed. Apr. 6, 1995).

Applying the PRA amendment here is in keeping with the broad public protection purpose of the previous and amended PRA. *Not* applying it to a pending case would undermine that purpose. The preexisting Public Protection Provision was meant to ensure that agencies would not be able to enforce paperwork requirements not complying with the PRA against the public to their detriment, "[n]otwithstanding any other provision of law." When this statute was enacted in 1980, the legislative history made clear that Congress intended that the public would not have to comply with "bootleg" requirements—they could "ignore" them without fear of penalty. *See* S. Rep. No. 96-930, at 17, 52 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6241, 6257, 6292. The new provisions simply confirm the objectives of the preexisting statute. As Senator Roth, the Senate Manager, put it:

> Since 1980, the act has provided a fundamental protection to every citizen that he or she need not comply with, or respond to, a collection of information if such collection does not display a valid control number given by OMB . . . .
>
> Moreover, in section 3512(b) the conferees made clear that the protections of section 3512 may be raised at any time during the life of the matter. The protections cannot be waived. Failure to raise them at any early stage does not preclude later assertion of rights under this section, regardless of any agency or judicial rules to the contrary.

141 Cong. Rec. S5274-75 (daily ed. Apr. 6, 1995). Not allowing a PRA defense to be raised and given effect here, in

the face of a clear violation, would thus defeat the objective underlying the 1995 clarifying amendment to the original Public Protection Provision.

Section 3512(b) only operates to protect the public from unlawful government conduct and does not have any application to Northeast. The court below correctly observed (Pet. App. 10a) that the statute was not retroactive:

> By permitting parties to raise the PRA issue "at any time" in ongoing proceedings, the statute . . . simply prevents an agency or court from refusing to consider a PRA argument on the ground that it is untimely.

Here, the FCC applied the statute in a completely prospective manner by granting the PortCell application on a going-forward basis only. It did not retroactively grant the PortCell application or retroactively invalidate Northeast's license award. In *Landgraf v. USI Film Products,* 511 U.S. 244, 273 (1994), this Court observed: "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new statute is not retroactive."

Application of the statute did not interfere with any vested rights, because Northeast's license grant never became final. Even though Northeast knew that its license grant depended on PortCell's asserted rights under the PRA being denied, it repeatedly opposed a stay of its license grant, indicating it was willing to accept the risk of building despite the lack of finality.[13] The fact that Northeast lost its license in the course of that litigation is, thus, not a consequence of retroactive application of the 1995 statute.

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[13] *See, e.g.*, Northeast, Opposition to PortCell Motion for Stay (filed with the FCC on July 7, 1993).

Congress enacted § 3512(b) to make crystal clear the public's right to assert their preexisting right to relief from unlawful penalties if a case is not yet over. A ruling that such relief was unavailable for a prior violation of the existing PRA, now that Congress has confirmed the public's right to this protection, just because the case was pending when the statute took effect, would be inconsistent with the language and goal of both the old and new PRA. Since 1980, Congress has clearly intended agencies and courts to correct unlawful penalties if they have the opportunity. The 1995 amendment reflects Congress's continued "zero tolerance" for PRA violations. Congress expressly intended that this right could be asserted for the first time even in a reviewing court.

II. NORTHEAST'S PETITION CONTAINS MATERIAL MISSTATEMENTS

Northeast so misstates the facts in this case that PortCell feels compelled to put at least a few things straight. Pursuant to Sup. Ct. R. 15.2, we correct some of Northeast's most significant misstatements:

- Northeast knowingly mischaracterizes PortCell as violating the FCC's *ex parte* rules in an effort to get the 1995 PRA passed. (Petition at 8.) The FCC specifically *rejected* this *ex parte* allegation. (Pet. App. 39a-44a.) Northeast is bound by this ruling, which it did not challenge on appeal.

- Northeast falsely claims that during the course of the litigation its investment in its licensed station was "secure" because "PortCell's application . . . was no longer in contention." (Petition at 7.) In fact, Northeast's grant was subject to the outcome of the ongoing litigation over the FCC's denial of the PortCell application. Northeast repeatedly and successfully opposed PortCell's requests for a stay of the Northeast license grant pending the outcome of the PortCell litigation, on the ground that it was ready and

willing to take the risk of building while the case was still being litigated.

- Northeast incorrectly states that PortCell "smuggl[ed]" the amendment to the Public Protection Provision through Congress. (Petition at 2; *see id.* at 8-9.) The amendment was part of a major public Congressional initiative to rewrite the PRA. After being proposed at a hearing, it was introduced on the House floor and accepted by a voice vote, after which it received close scrutiny from the Conference Committee for three months. In fact, the Senate Conference Manager stated on the day of passage that "the topic that captured more time in conference discussion than any other was that of redrafting section 3512 . . . ." 141 Cong. Rec. S5274-75 (daily ed. April 6, 1995) (statement of Sen. Roth). The amendment was also the subject of a colloquy immediately before the final bill passed the House. 141 Cong. Rec. H4376 (daily ed. Apr. 6, 1995).

- Although critical of PortCell's legislative efforts, Northeast never mentions its own clandestine effort to smuggle through "rifle shot" legislation in an attempt to gut the 1995 PRA. In fact, in 1996 it tried in a truly "dark of night" effort to attach an amendment exempting this particular case from the Public Protection Provision of the PRA to a Continuing Resolution dealing with appropriations matters. This effort failed because of substantial opposition in the Senate and the House (including the sponsors of the 1995 PRA).

- Northeast falsely claims, without basis, that "PortCell used NYNEX's considerable clout on Capitol Hill" to get the legislation passed. (Petition at 8.) PortCell is a general

partnership in which affiliates of NYNEX[14] and two small independent Maine telephone companies held equal interests. NYNEX had no involvement in any legislative efforts undertaken on behalf of the partnership when Congress undertook "top to bottom" review of the entire PRA.

- Finally, Northeast claims that it has completely followed FCC regulations while PortCell has not, and thus Northeast has been unfairly treated. (Petition at 29.) First, the rule PortCell allegedly failed to satisfy was unenforceable as a threshold matter, and thus Northeast had no right to the license. Northeast also ignores that PortCell had to stop operating in 1992 based on the same unenforceable rule. Second, there are serious unresolved questions concerning control of Northeast that go to its basic eligibility to hold the license, which were very much in issue until they were rendered moot by the grant to PortCell. Northeast knows full well that a formal evidentiary hearing would likely have been held by the FCC into its wireline qualifications.

[14] Since the enactment of the 1995 PRA, NYNEX has been merged into Bell Atlantic Corporation.

CONCLUSION

For the foregoing reasons, there is no issue worthy of review and Northeast's petition for certiorari should therefore be denied.

Respectfully submitted,

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July 15, 1998

APPENDIX

FCC 94-176
[9 F.C.C.R. 3291]

Before the Federal Communications Commission
Washington, D.C. 20554

In re Applications of	)	
	)	
PORTLAND CELLULAR PARTNERSHIP, For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B, in Market 152, Portland, Maine	)	File No. 27414-CL-P-152-B-86
	)	
NORTHEAST CELLULAR TELEPHONE COMPANY, L.P., For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B, in Market 152, Portland, Maine	)	File No. 27488-CL-P-152-B-86

Released: June 29, 1994
Adopted: June 24, 1994

MEMORANDUM OPINION AND ORDER

By the Commission:

I. INTRODUCTION

1. Before the Commission are two petitions for further reconsideration and a petition for reconsideration of our *Memorandum Opinion and Order* (*MO&O*) in the above-

captioned proceeding, 8 FCC Rcd 4146 (1993). Portland Cellular Partnership (Port Cell) and Community Service Telephone Co. (Community) filed separate petitions for further reconsideration on June 25, 1993 and July 6, 1993 respectively. Both Port Cell and Community request reconsideration of the dismissal of Port Cell's application; Community also requests reconsideration of the denial of its request for a waiver of the cellular cross-interest rule.[1] Oppositions to the petitions have been filed by Northeast Cellular Telephone Company, L.P. (Northeast). In addition, Northeast submitted a letter requesting that the Commission further condition the interim operating authority given to Port Cell in the *MO&O,* to which Port Cell submitted an opposition.[2] For the reasons stated below, we deny Port Cell's petition and dismiss in part and deny in part Community's petition. We also deny Northeast's request to condition further the interim operating authority given to Port Cell.

II. DISCUSSION

2. In our *MO&O*, among other things, we denied a petition for reconsideration of our decision in *Portland Cellular Partnership,* 6 FCC Rcd 2283 (1991), on remand from the D.C. Circuit's decision in *Northeast Cellular Telephone Company, L.P. v. FCC,* 897 F.2d 1164 (D.C. Cir. 1990), in which we dismissed Port Cell's application for failure to meet our financial qualifications rule and affirmed the staff's prior denial of Community's request for a waiver of the cellular cross-interest rule. In the *MO&O* we also dismissed a Petition for Reconsid-

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[1] Section 22.921 prohibits interests of one percent or more in more than one application for a market, and interests of one percent or more in mutually exclusive applications for non-MSA/non-NECMA areas. *See Cellular Radio Lotteries,* 101 FCC 2d 577, 598 (1985).

[2] In addition, Port Cell filed a separate petition for reconsideration of the Commission's decision to grant Northeast's application. That petition will be addressed separately in a future order.

eration and Reinstatement of License, filed by Port Cell, because the petition was filed nearly a year after the 30-day deadline for such petitions as set forth in Section 405 of the Communications Act. 47 USC § 405. In that petition, Port Cell argued that its license must be reinstated because the Commission's financial qualifications rules had not been approved by the Office of Management and Budget as required by the Paperwork Reduction Act.

3. In its petition for further reconsideration of the *MO&O*, Port Cell argues that the Commission had both the jurisdiction and the discretion to consider its Petition for Reconsideration and Reinstatement of License and that its failure to do so was erroneous. According to Port Cell, Section 405 of the Communications Act of 1934 is not an absolute bar to considering untimely petitions for reconsideration. Port Cell argues that once a timely petition for reconsideration has been filed, the Commission has jurisdiction to reconsider its decision on the grounds raised in the timely petition and also has the discretion to reconsider on grounds raised in other pleadings or by the Commission *sua sponte*, citing *Meredith Corp. v. FCC,* 809 F.2d 863 (D.C. Cir. 1987). Port Cell also cites *Central Florida Enterprises, Inc. v. FCC,* 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed,* 441 U.S. 957 (1979), for the proposition that the timely filing of a petition for reconsideration satisfies the jurisdictional requirements of Section 405, tolling the 30-day period for reconsideration of a decision on the Commission's own motion. Other cases cited by Port Cell in support of its petition are *Albertson v. FCC,* 182 F.2d 397 (D.C. Cir. 1950), *Gardner v. FCC,* 530 F.2d 1086 (D.C. Cir. 1976) and *Enterprise Co. v. FCC,* 231 F.2d 708 (D.C. Cir. 1955), *cert. denied,* 351 U.S. 920 (1956). In its opposition, Northeast challenges Port Cell's interpretation of these cases.

4. We agree with Northeast that the cases cited by Port Cell do not require acceptance of Port Cell's untimely petition for reconsideration. For example, in *Meredith Corp. v. FCC,*

supra, the D.C. Circuit held that it had jurisdiction to consider constitutional arguments raised for the first time by an appellant in a supplement to its timely filed petition for reconsideration to the FCC. Here, Port Cell did not file a timely petition for which it could file a supplement. Likewise, *Central Florida Enterprises v. FCC, supra,* is not on point. There, the Court found that the pendency of a timely petition for reconsideration permitted the Commission, *sua sponte,* to clarify its earlier decision. Furthermore, contrary to Port Cell's assertions, the Commission does not have a statutory duty to consider arguments raised in an untimely petition for reconsideration. As Northeast points out, the fact that the Commission *might have* used the pendency before it of a timely petition for reconsideration filed by a party other than Port Cell as a basis for considering on its own motion the arguments belatedly raised by Port Cell does not mean that it had an *obligation* to do so.

5. Similarly, the *Gardner* case, as interpreted by the court in *Reuters Limited v. FCC,* 781 F.2d 946 (D.C. Cir. 1986), does not support Port Cell's argument. In *Reuters,* the court held that the Commission was barred by statute from entertaining a belated petition for reconsideration except where, as in *Gardner,* there were extraordinary circumstances under which the mandatory language of Section 405 did not preclude consideration of an untimely petition because the Commission failed to give required notice of its decision. However, the court made it clear that the holding in *Gardner* was limited to the highly unusual circumstances in that case, including the fact that the Commission failed to give notice to the party of its action. Here, there are no extraordinary circumstances which warrant consideration of Port Cell's belated petition. *Albertson* and *Enterprise* are also inapposite. Neither case requires that the Commission consider late-filed petitions for reconsideration. In *Albertson,* the court held that a party may file for reconsideration of a Commission order denying reconsideration if it does so within the statutory time period. In *Enterprise,* the court held that under the circumstances of that case, the

Commission should have considered new factual developments presented to it during the pendency of a petition for reconsideration where those new facts went to the heart of the factual premise of the Commission's decision and were raised promptly (within three days) of their discovery. Port Cell's grossly untimely presentation of a new legal argument does not fall within these cases.

6. In sum, while we have discretion to consider, on our own motion, whether Port Cell's application should be reinstated because of alleged Paperwork Reduction Act violations, we believe it would be inappropriate to exercise our discretion in favor of considering Port Cell's argument based on the Paperwork Reduction Act. Port Cell's failure to avail itself of this argument when its compliance with our financial qualifications rule was first called into question imposed a particularly heavy burden on the resources of the court, the Commission and the other parties to this proceeding. These resources were consumed litigating the issue of Port Cell's compliance with the financial qualifications rule and the related waiver issue first before the Commission and then before the court in a difficult appeal, and thereafter again before the Commission on remand and in connection with timely filed petitions for reconsideration. This litigation could have been avoided if Port Cell had been diligent in asserting its rights based on the Paperwork Reduction Act.[3] Moreover, we perceive no countervailing

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[3] *Cf. Northwestern Indiana Telephone Co. v. FCC*, 872 F.2d 465 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990). We note that our decision here differs from other decisions where we have reinstated cellular applications still pending before the Commission on the basis of the fact that the underlying rule had not received approval by the Office of Management and Budget under the Paperwork Reduction Act, even if the applicant had not raised this issue at the earliest possible time. *See Asset Management Corp.*, 6 FCC Rcd 6538 (Mob. Ser. Div. 1991), *Dana Communications, Ltd.*, 7 FCC Rcd 1878 (1992) and *Kent S. Foster*, 7 FCC Rcd 7971 (1992). In none of these cases, however, had the case progressed to a final Commission decision that had been reviewed in court. Indeed, for us to consider the

public interest reason at this juncture to reconsider on our own motion our prior decision in the *MO&O*. Accordingly, we deny Port Cell's petition.

7. In its petition for reconsideration, Community asks the Commission to revisit its decision denying Community a waiver of the cellular cross-interest rule. *See* 47 CFR § 22.921.[4] This matter has been fully considered before and nothing raised by Community supports revisiting that decision now. Accordingly, we deny Community's petition with respect to this issue.

8. Finally, Northeast has requested that we add conditions to Port Cell's interim operating authority consistent with conditions the staff has issued previously to interim cellular operators where there was no permanent licensee or where the permanent licensee was not ready to commence service. According to Northeast, these conditions would require Port Cell to cooperate fully with it to effectuate a smooth transition to the provision of service in the market by Northeast and to cooperate in transferring the Portland cellular customer base to Northeast. Northeast argues that conditioning Port Cell's interim authority as requested would avoid any disruption in service to the public and would ensure a smooth transition of service from Port Cell to Northeast. In its opposition to this request, Port Cell argues that there is no valid reason for imposing conditions on the continued provision of interim

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Paperwork Reduction Act issue now might conflict with the court's instruction in *Northeast Cellular* that "[a]bsent a finding" that certain information "was considered and used in formulating an articulable standard at the time the waiver was granted, the FCC *must disqualify* Port Cell's application." *Northeast Cellular,* 897 F.2d at 1167 (emphasis added).

[4] Community also raises, for the first time, financial qualifications and Paperwork Reduction Act issues. Because it has not shown why it did not raise this issue previously, its petition is dismissed with respect to these issues. *See* 47 CFR § 1.106(c).

service until a licensee has been selected by a decision that has passed final judicial muster. We believe that additional conditions are unnecessary to ensure a smooth transition. In the *MO&O* we stated that Port Cell's interim operating authority would terminate only when Northeast is ready to begin providing service, and that Northeast shall notify Port Cell of its intention to commence service no less than 10 days prior to commencement of service. Therefore, we deny Northeast's request for imposition of additional conditions. To the extent, however, that Port Cell fails to cooperate in the transition, Northeast can bring evidence of this failure to our attention. We would then be prepared to take whatever action necessary to achieve a smooth transition for cellular customers.

III. CONCLUSION

9. Having reviewed the petitions for further reconsideration filed by Port Cell and Community we affirm our decisions in the *MO&O* regarding the applications of Port Cell and Community. Nor are we convinced that further conditions should be imposed on Port Cell's interim operating authority. This concludes our third decision on remand of *Northeast Cellular Telephone Company, L.P. v. FCC,* 897 F.2d 1164 (D.C. Cir. 1990), with respect to Port Cell's and Community's applications.

IV. ORDERING CLAUSES

10. Therefore, for the foregoing reasons, IT IS ORDERED THAT the decisions in *Portland Cellular Partnership,* 8 FCC Rcd 4146 (1993), ARE AFFIRMED to the extent set forth herein.

11. IT IS FURTHER ORDERED THAT the Petition for Further Reconsideration filed by Portland Cellular Partnership IS DENIED.

12. IT IS FURTHER ORDERED THAT the Petition for Further Reconsideration filed by Community Services Telephone Company IS DISMISSED IN PART AND DENIED IN PART.

13. IT IS FURTHER ORDERED THAT the request by Northeast Cellular Telephone Company, L.P. to condition Port Cell's interim operating authority IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
William F. Caton
Acting Secretary

FCC 93-296
[8 F.C.C.R. 4146]

Before the Federal Communications Commission
Washington, D.C. 20554

In re Applications of:	)	
	)	
PORTLAND CELLULAR PARTNERSHIP, For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B, in Market 152, Portland, Maine	)	File No. 27414-CL-P-152-B-86
	)	
NORTHEAST CELLULAR TELEPHONE COMPANY, L.P., For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B, in Market 152, Portland, Maine	)	File No. 27488-CL-P-152-B-86

Released: June 4, 1993
Adopted: June 4, 1993

MEMORANDUM OPINION AND ORDER

By the Commission:

I. INTRODUCTION

1. Community Service Telephone Co. (Community) has filed a petition for reconsideration of the Commission's decision in *Portland Cellular Partnership,* 6 FCC Rcd 2283

(1991), (hereinafter *Port Cell Remand Order*). Community has also filed an application for review[1] of the Common Carrier Bureau's decision declaring Northeast Cellular Telephone, L.P. (Northeast) the first ranked applicant and tentative selectee for the Portland Maine Block B cellular market. This *Order* will address the arguments raised by Community in its petitions. We will also address two separate petitions to dismiss or deny the application of Northeast filed by Portland Cellular Partnership (Port Cell)[2] and Saco River Cellular, Inc. (Saco River)[3]. Oppositions and responsive pleadings have been filed by the parties to this proceeding. For the reasons set forth below, we affirm the *Port Cell Remand Order* and grant Northeast's

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[1] Community's application for review incorporates its petition for reconsideration and is directly related to review of the decision naming Northeast as the tentative selectee announced in Public Notice 12867, Report No. CL-91-139 (released Apr. 30, 1991). While the naming of an entity as a tentative selectee is not an "action" subject to Commission review under 47 U.S.C. § 305(c) and 47 C.F.R. § 1.15, in order to resolve all pending matters in this complex case, we will address Community's arguments. Moreover, because the arguments in the petition for reconsideration and the application for review are identical, we will refer to both as Community's "petition."

[2] At the time of the grant, Port Cell consisted of Seacoast Cellular, Inc. (Seacoast) (42 percent interest), NYNEX Mobile Communications Company (NYNEX) (48 percent interest) and Community Services Telephone Company (10 percent interest). Port Cell's ownership has since been divided equally among NYNEX, Seacoast, and Lewiston-Auburn Cellular.

[3] Port Cell also submitted a "Motion for Leave to File Response" to the Consolidated Reply of Northeast and Northeast submitted an opposition to Port Cell's pleading.

application.[4] Community has failed to demonstrate any Commission error upon which relief may be granted.[5]

II. BACKGROUND

2. The application of Seacoast was selected first in the lottery for the Portland, Maine cellular radio market. The application of Seacoast was substituted with the application of Port Cell pursuant to a pre-lottery partial settlement. The Mobile Services Division (MSD) found the substituted application acceptable and granted an authorization to Port Cell.[6] This

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[4] On April 29, 1992, Port Cell filed a Petition for Reconsideration and Reinstatement of License, to which Northeast filed an Opposition. Port Cell filed its reconsideration petition nearly a year after the 30-day deadline for such petitions set forth in Section 405 of the Communications Act. 47 U.S.C. § 405. As we have repeatedly noted, "except where the Commission fails to provide notice of its decision to parties as required by its rules, we lack authority to extend or waive the statutory 30-day filing period specified in Section 405." *Heritage Cablevision Associates of Dallas, L.P.*, 7 FCC Rcd 4192, 4193 (1992) (subsequent history omitted). *See also id.* at 4194 n.15 for additional case references. Accordingly, we dismiss Port Cell's untimely petition for reconsideration. Additionally, on March 31, 1993, Port Cell filed a letter with the Chairman which raised the same matters raised in its late-filed Petition for Reconsideration. Northeast filed a response to this letter. This letter is simply a supplement to a late-filed petition for reconsideration and is therefore not considered herein.

[5] Section 1.106(d) of the Commission's Rules sets forth the requirements of a petition for reconsideration. While Community has attempted to cite the conclusions which it believes to be erroneous, it has not persuaded us that there is any error in the *Port Cell Remand Order*.

[6] *See Portland Cellular Partnership*, 2 FCC Rcd 5586 (Mobile Serv. Div. 1987). In finding Port Cell qualified, the MSD also denied requests for waiver of Section 22.921 of the Commission's Rules. Seacoast and Community filed waiver requests because common shareholders between them own more than one percent of the stock in each. In their request, Seacoast and Community requested alternative relief that Community's application be dismissed and only Seacoast's application be considered in the lottery. In a letter dated May 27, 1986, the MSD stated that it was in the public interest to include both applications in the lottery and consider the

grant was affirmed by the Commission.[7] Northeast and Saco River appealed the Commission's decision to the United States Court of Appeals for the D.C. Circuit. The Court vacated and remanded the Commission's Order[8] agreeing with the petitioners that the Commission's decision to waive the financial requirements was not consistent with *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (*WAIT Radio*).[9]

3. Accordingly, in the *Port Cell Remand Order*, the Commission vacated its grant and dismissed the Port Cell application; dismissed the application of Seacoast as amended to substitute Port Cell as the applicant; and granted Port Cell interim authority to provide service until the grant of a new construction permit. As the next ranked applicant, Saco River would have become the tentative selectee.[10] However, a review of its application revealed that Saco River proposed a 39 dBu

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requests for waiver after the lottery if Seacoast or Community were selected. *Id.* at 5587. The MSD further stated that if Community's application were selected first it would consider the second-ranked applicant as the tentative selectee in the market, thereby essentially granting the alternative relief sought by the parties. In its *Order* granting Port Cell, the MSD stated that because Community's application was not selected first it did not have to be formally dismissed and that Seacoast's application was properly accepted as the tentative selectee.

The *MSD Order* also found Port Cell financially qualified despite the fact that the letter of credit from NYNEX Credit Company (NCC) failed to contain the terms of the loan commitment and did not make an assessment as to the creditworthiness of Port Cell as required by the Commission's Rules. The MSD determined that NCC fulfilled the Commission's requirements in a subsequent letter.

[7] *Portland Cellular Partnership*, 4 FCC Rcd 2050 (1989).

[8] *Northeast Cellular Telephone Company, L.P. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

[9] Port Cell's petition for rehearing was denied on May 9, 1990.

[10] The application of Seacoast Cellular was chosen as the first ranked applicant in the Portland, Maine, lottery followed by Saco River, Community, Northeast, and NYNEX. Seacoast, Community, and NYNEX entered into a pre-lottery settlement agreement.

contour extension into the adjacent Lewiston-Auburn New England County Metropolitan Area (NECMA) that was not *de minimis* and therefore prohibited. Thus, the Saco River application was found defective and was dismissed. Northeast, the next ranked applicant, was announced the tentative selectee for the Portland cellular market in a separate public notice. *See* Public Notice 12867, Report No. CL-91-139 (released Apr. 30, 1991).[11]

III. PLEADINGS; DISCUSSION

A. Pleadings

1. Community's Petition

4. In its application for review and petition for reconsideration, Community makes three main arguments. First, it argues that the Commission erred in not upholding the grant of Port Cell's application. According to Community, the court remanded the Commission's grant to Port Cell on the narrow ground that the Commission failed to articulate adequately both the basis and the standard for granting a waiver of strict compliance with the financial qualifications rules. Community contends that on remand it was incumbent upon the Commission to review the record to determine whether Port Cell was financially qualified.

5. Second, Community maintains that the Commission erred in not allowing it to remain ranked among the lottery winners. In Community's view, the Commission ignored the statement that its voluntary dismissal of its application was

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[11] Community's application was not considered in the lottery results pursuant to the alternative relief granted Seacoast and Community in the May 27, 1986, letter allowing both Seacoast and Community to compete in the lottery and stating that Community would not be considered if selected first. *See* para. 6 *infra*.

conditioned upon the grant of the permit to Port Cell. Indeed, Community states that settlements will be much harder to achieve if the settling parties cannot reasonably escape the settlement when the settlement application is not acceptable to the Commission. It is unfair, Community asserts, to penalize two applicants who properly filed applications, reached a partial settlement encouraged by the Commission, and invested time and resources into building and operating a successful cellular system.

6. Third, Community requests reconsideration of the MSD's earlier denial of its request for a waiver of Section 22.921.[12] Community and Seacoast requested waivers in their applications because they had two common shareholders who owned more than 1 percent of the stock in each.[13] Community states that the purpose of the rule is to prevent the filing of multiple applications by commonly controlled corporations, thus promoting administrative efficiency and minimizing the possibility that any applicant may have a substantial interest in more than one application for a cellular license. However, Community argues, it is not commonly controlled by one or more corporations, and no party will have a substantial interest in more than one applicant for the license. Thus, Community asks the Commission to revisit the MSD's decision and grant its waiver request.

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[12] *See Portland Cellular Partnership*, 2 FCC Rcd 5586 (Mobile Serv. Div. 1986).

[13] Two of the stockholders of Utilities, the parent company of Seacoast, owned more than 1 percent of the stock of Community. Rotelcom, Inc. owned 16.2 percent of Utilities and 6% of the stock of Community and The Estate of Frank Southard owned 1.2 percent of the stock of Utilities and 17.12 percent of the stock of Community. The MSD found that these percentages represented a "substantial level of cross-ownership, that these applications did not demonstrate the existence of special circumstances [,and] that the purpose of Section 22.921 would not be served by the waiver request." *See Portland Cellular Partnership*, 2 FCC Rcd 5586, 5587 (Mobile Serv. Div. 1987). Accordingly, the MSD denied the waiver requests. *Id.*

7. In its opposition to Community's petition for reconsideration, Northeast asserts that most of the arguments presented by Community were addressed in other pleadings in this proceeding.[14] In light of the opinion of the court, Northeast contends that the Commission cannot now find Port Cell financially qualified. It maintains that Community cannot now challenge the 1987 MSD decision which found Community ineligible to participate in the lottery, because it should have asserted this challenge immediately after its request was denied. Northeast further maintains that Community and Seacoast both requested that if the Commission denied the Section 22.921 waiver request, Seacoast's application be allowed to remain on file while Community's application would be dismissed with prejudice. Northeast argues that because Community did not appeal the order at the time, allowing it to do so now, would result in giving both Seacoast and Community a chance in the lottery—the precise result that the Commission sought to prevent by adopting the cross-ownership rule.

2. Northeast; Petitions to Deny

a. Port Cell

8. In its petition against Northeast's application, Port Cell presents three arguments. First, it claims that the engineering exhibits contained in the original application contained numerous defects. For example, six of the seven cells proposed by Northeast for its cellular system contain 39 dBu extensions into adjacent NECMAs, and two cells contain extensions into Rural Service Areas (RSAs). Also, one of the cells proposed 39 dBu

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[14] Northeast refers to "Northeast Motion for Appropriate Procedures Following Remand," filed June 15, 1990; its "Opposition to Memorandum of Portland Cellular Partnership Regarding Commission Action on Remand," filed July 16, 1990, and "Northeast Motion To Strike, and in the Alternative, Response of Northeast Cellular Telephone Company, L.P. To Reply of Portland Cellular Partnership," filed Aug. 23, 1990.

contours that extend into a central NECMA. Port Cell maintains that all of these extensions are in violation of the Commission's rules and precedent, citing *Alltel Cellular Assoc. of the Carolinas,* 61 Rad. Reg. 2d (P&F) 225, 227 & n.10 (Com. Car. Bur. 1986) and *Advanced Mobile Phone Service, Inc.,* 52 Rad. Reg. 2d (P&F) 1593, 1602-03 (Com. Car. Bur. 1983).

9. Second, Port Cell contends that Northeast failed to demonstrate reasonable assurance that the cell sites specified in its application were available. Port Cell claims that some of the sites proposed by Northeast were not available when its application was filed. There is no evidence, Port Cell claims, to suggest that Northeast or its agent contacted the owners of the sites to determine the sites were available. In fact, Port Cell notes that Northeast recently confirmed, in an amendment, that at least three of its originally proposed sites are, in fact, not available. This, Port Cell avers, is in violation of Commission rules and renders Northeast's application defective for lack of site availability.

10. Finally, Port Cell states that Northeast has failed to disclose the real party in interest behind its application. Port Cell expresses doubt that Northeast could have secured financing independently and thus concludes that United States Cellular Corporation (USCC), a subsidiary of Telephone and Data Systems, Inc. (TDS), is the real party in interest behind the application. Port Cell maintains that it is entitled to an evidentiary hearing to determine whether Northeast had reasonable assurance of site availability and whether Northeast is controlled by USCC and TDS.[15]

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[15] The ownership history of Northeast is long and complicated. As explained by Northeast, in September 1983, Pine Tree Technology (PTT) and TDS entered into a Shareholders' Agreement providing for the creation of a joint venture corporation for the purpose of applying to the Commission to construct and operate wireline cellular systems in the Portland and Lewiston-Auburn, Maine, NECMAs. PTT was then the wholly owned

subsidiary of The Pine Tree Telephone and Telegraph Company (Pine Tree Tel and Tel). Almost 95 percent of Pine Tree Tel and Tel's stock was and is owned by Timothy D. Hutchison. The Shareholders' Agreement provided that PTT would hold a 65 percent interest and TDS a 35 percent interest in the joint venture corporation. In 1985, PTT and TDS determined that the cellular applicant would be a limited partnership, with the same ownership percentages. In July 1985, the Articles of Incorporation for Maine State Cellular Telephone Company (Maine State), the proposed general partner corporation for the applicant partnership, were filed with the Maine Secretary of State. In 1986, TDS assigned its rights to acquire its shares to its newly formed and then wholly owned subsidiary, USCC. On March 14, 1986, PTT, USCC, and Maine State entered into the "Certificate and Agreement of Limited Partnership" for Northeast. This agreement has been amended several times. Wireline lotteries for the Portland and Lewiston NECMAs took place in May and November, 1986, and Northeast did not win either lottery.

In 1987, USCC entered into an option agreement to purchase a controlling interest in the non-wireline permittee in the Lewiston, Maine, NECMA. Under the Commission's rules and policies, USCC could not acquire the Lewiston non-wireline interest if it retained an interest in a Lewiston wireline application. Thus, Maine State, PTT, Mr. Hutchison, TDS, and USCC agreed that USCC would withdraw from Northeast, exercise its option to acquire the non-wireline interest in Lewiston and obtain an option to reacquire a minority interest in Northeast at some time in the future. In May 1988, USCC and the controlling partner in the Lewiston non-wireline partnership filed an application for transfer of control which was consummated on October 18, 1988. Between February 1, 1988 and October 8, 1990, TDS and USCC held no ownership interest in Northeast and played no part in its affairs. Prior to this, on October 27, 1987, Mr. Hutchison had purchased PTT from Pine Tree Tel and Tel giving PTT a 99 percent limited partnership interest in Northeast. Maine State continued to hold a 1 percent general partnership interest, with PTT holding a 51 percent interest in Maine State and Mr. Hutchison holding the remaining 49 percent interest personally. On December 20, 1988, in *Northeast Cellular Telephone Company, L.P. v. FCC*, No. 88-1563, U.S. Court of Appeals for the D.C. Circuit summarily affirmed the Commission's decision dismissing Northeast's application for the nonwireline license in the Lewiston NECMA. Thereafter, Northeast had no further possibility of obtaining an interest in the Lewiston NECMA and then could pursue its Portland application. Since USCC had no interest in the non-wireline licensee in Portland, USCC was no longer barred by the Commission's rules and policies from having a minority interest in Northeast. After the Court of Appeals decision vacating the

b. Saco River

11. Saco River maintains that changes in Northeast's ownership make it ineligible for a wireline authorization, under Section 22.902(b) of the Commission's Rules.[16] Saco River argues that the reorganized Northeast is not a common carrier engaged in the business of providing landline telephone service and cannot meet the Commission's common carrier eligibility requirements. Saco River states that Northeast's only claim to connection with a local exchange telephone company providing service in the Portland NECMA is that its majority limited partner is owned by an individual who also owns shares in PTT, a wholly-owned subsidiary of Pine Tree Tel and Tel. According to Saco River, this shareholder relationship does not impute wireline presence in the market to Northeast.[17] In addition,

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Commission's grant of Port Cell's application, USCC and Mr. Hutchison agreed that USCC's subsidiary, USCOC of Portland, Inc. (USCOC), would acquire a 48.51 percent limited partnership interest in Northeast and a 49 percent interest in Maine State.

[16] Section 22.902(b) provides that:

> Common carriers engaged directly or indirectly in the business of affording public landline message telephone service will be assigned frequencies from Cellular System B in those areas in which they provide such landline service in some portion of the market.

47 C.F.R. § 22.902(b).

[17] For support, Saco River cites *Cellular Communications Systems,* 86 FCC 2d 469, 487-491 (1981), *recon.,* 89 FCC 2d 58 (1982), *further recon.,* 90 FCC 2d 571 (1982), *appeal dismissed sub nom. United States v. FCC,* No. 82-1526 (D.C. Cir. Mar. 3, 1983) (wireline presence needed for eligibility) and *Montgomery Independent Cellular Telephone Co., Inc.,* 2 FCC Rcd 4385 (Mobile Serv. Div. 1987), *recon. denied,* 3 FCC Rcd 396 (Com. Car. Bur. 1988), *review denied,* 4 FCC Rcd 2323 (1989) (84 percent interest in applicant held by entity not authorized to provide public landline telephone service).

Saco River contends that Northeast's proposed cell extension of "over 25 percent" for one cell is not *de minimis* and must be dismissed. Likewise, Saco River asserts that Northeast cannot be allowed now to amend its application to cure the defect.

12. In its consolidated reply, Northeast states that at the time its application was filed in March 1986, all of the extensions proposed in its application were *de minimis* and justified according to the Commission's Rules. Moreover, Northeast contends that even if its extensions are not *de minimis*, the Commission cannot now dismiss its application. It argues that, unlike the application of Saco River, Northeast included in its application a specific statement explaining why it was necessary "to engineer the particular cells such that the 39 dBu contours could not be kept within the SMSA or NECMA," citing *Cellular Applications Filing Procedures: An Update,* 52 Rad. Reg. 2d (P&F) 725, 726 (1982). Northeast concludes that, if the Commission does not accept the engineering explanation, it may only require that the applicant bring the 39 dBu contour back within the MSA or NECMA. Northeast uses its discussion of the Commission's *de minimis* policies to buttress its assertion that it should only be required to bring its contours into compliance should the Commission not accept Northeast's engineering explanation.

13. In addition, Northeast dismisses Port Cell's allegation that USCC is the real party in interest behind its application. At the time its application was filed, Pine Tree Technology was a wholly-owned subsidiary of Pine Tree Tel and Tel. Pine Tree Tel and Tel sold its interest in PTT to Mr. Timothy Hutchison, who now is its sole owner. Mr. Hutchison is also 95 percent shareholder of Pine Tree Tel and Tel. However, the telephone company no longer owns any interest in PTT or Northeast. By virtue of these changes, Saco River argues that Northeast is not a common carrier engaged in the business of providing landline telephone service. Northeast responds that Section 22.902(b) grants licenses to common carriers engaged directly or indi-

rectly in the business of offering public landline message telephone service. There is no requirement, Northeast maintains, that wireline cellular applicants be owned by any commonly controlled telephone company.

14. Finally, Northeast contends that petitioners' allegation that it has not received reasonable assurance for its proposed sites is not correct. To counter petitioners' claim, Northeast submits two sets of "Options to Acquire Easement" (and "Letter of Intent") covering all seven of Northeast's cell sites. Over the past five years, Northeast notes that three of the original cell sites became unavailable and the options for the other cell sites expired. After it was named tentative selectee, Northeast renewed the options for Cells 3, 5, 6, and 7 and obtained new options, at nearby locations, for Cells 1, 2, and 4. Therefore, Northeast urges the Commission to reject this argument.[18]

B. Discussion

1. Community's Petitions

15. Upon review of Community's petitions, we find that Community has failed to demonstrate any Commission error in dismissing Port Cell's application and naming Northeast as the tentative selectee. In remanding the Commission's order

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[18] Subsequent to the filing of pleadings allowed under the Commission's Rules, Port Cell filed an additional pleading challenging Northeast's response in its reply that it had received reasonable assurance for its original Cell 2. Port Cell maintains that the coordinates for that proposed cell is a wetland area unsuitable for use. In its response, Northeast urges the Commission to reject the filing as an abuse of the FCC's processes, because Port Cell could have made this argument earlier in the proceeding. Neither of these additional pleadings is authorized by the Commission's Rules. However, since these pleadings relate to timely raised issues, in order to have a full record upon which to base our decision, we have considered the matters raised in these filings.

granting the application of Port Cell, the court found that the Commission failed to comply with *WAIT Radio* because it did not articulate any standard by which the court could determine the policy underlying the Commission's waiver. The court indicated the type of specific information the Commission should have included in determining whether a waiver was appropriate. As we stated in the *Port Cell Remand Order,* the facts in this case simply do not demonstrate Port Cell's financial qualifications under the Commission's Rules, and its request for a waiver is without justification and therefore must be denied. *See Port Cell Remand Order,* 6 FCC Rcd 2283, 2284 (1991).

16. We also reject Community's argument that it should receive a second opportunity to be awarded the cellular license in the Portland market. Community can only receive a license if its request for a waiver of the cross-interest rule contained in Section 22.921 is granted. The record is clear that Community's application violated Section 22.921 and its contention that it is not under common control with Seacoast, at least for the purposes of our Rules, is simply erroneous. Moreover, Community has shown no facts that would support grant of a waiver. *See* n.12, *supra.* We have consistently applied Section 22.921 and find no justification in this case to depart from those decisions.[19] We affirm the MSD's denial of Community's request for waiver of Section 22.921 and dismiss its application.[20]

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[19] *See, e.g., Progressive Cellular III B-3,* 6 FCC Rcd 7178 (1991), *aff'd,* No. 92-1006 (D.C. Cir. Feb. 2, 1993); *Florida Cellular Mobil Communications Corporation,* 6 FCC Rcd 6910 (1991). Both *Progressive* and *Florida Cellular* filed requests for waivers of Section 22.921. The Commission denied the requests and dismissed the applications.

[20] We note that Section 22.19 provides: "If a waiver is not granted, the application will be dismissed as defective unless the applicant has also provided an alternative proposal which complies with the Commission's Rules." The alternative proposal provided by Community and Seacoast in

2. Northeast; Petitions to Deny

a. 39 dBu Contour Extensions

17. We now turn to the petitions to dismiss or deny the Northeast application. At the time this application was filed, Commission policy stated that the 39 dBu contours as well as the Cellular Geographic Service Area (CGSA) should generally be kept within borders of the MSA or NECMA. However, the policy provided that minor overlap of 39 dBu contours into another MSA or NECMA would not render an application defective provided an explanation was included to show the contour incursions were necessary.[21] In the *Port Cell Remand Order*, we dismissed Saco River's applications because the proposed 39 dBu contour extension into the adjacent Lewiston-Auburn NECMA was not *de minimis*. Northeast, on the other hand, proposes extensions which are *de minimis* and includes in its application a detailed explanation regarding its 39 dBu contour extensions into neighboring market areas. In reviewing Northeast's application, for the reasons set forth below, we find the extent of the proposed extensions—both as originally proposed and as amended—to be *de minimis* and supported by an adequate engineering explanation. Neither Saco River nor Port Cell has presented any facts which demonstrate otherwise.

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their request for a waiver of Section 22.921 was that Community's application be dismissed if the waiver request is not granted. The MSD essentially acceded to this request. *See Portland Cellular Partnership,* 2 FCC Rcd at 5586-87; *see also,* n.6, *supra.*

[21] *See Cellular Communications Systems,* 89 FCC 2d 58, 87 (1982); *Return of Round IV Cellular Applications,* 103 FCC 2d 171, 172-74 (1986); Public Notice, *Cellular Application Filing Procedures, An Update,* 52 Rad. Reg. 2d (P&F) 725 (Mobile Serv. Div. 1982). Acceptable contour incursions are termed *de minimis* extensions. Contrary to our *dicta* in the *Port Cell Remand Order,* 6 FCC Rcd at 2284, if there is an adequate explanation, *de minimis* contour extensions into *any* MSA, NECMA, or other area were permissible.

18. In its initial application, Northeast proposed the following extensions. Originally, Cell 001 extended beyond the CGSA into the Atlantic Ocean 5 square miles. This constituted only 3.6 percent of the land area of Cell 001 and obviously covered no population areas. The total 39 dBu extension area of Cell 002 initially proposed was 6.9 square miles into the Portsmouth NECMA. This extension constituted only 4.8 percent of Cell 002 and 0.68 percent of the Portsmouth NECMA. This cell extended into an area where there is an irregular NECMA boundary, and did not include a significant area of population. Northeast proposed a 39 dBu contour extension of Cell 003 into the Lewiston NECMA of 5.2 square miles or 2.9 percent of the entire cell area and 1.1 percent of the Lewiston NECMA. Again, the extension included an irregular NECMA boundary and did not appear to cover any significant population centers within the Lewiston NECMA. Likewise, the extension of Cell 004 into the Lewiston market constituted only 2.1 percent of the area of the entire cell and 1.2 percent of the area of the Lewiston NECMA and included an irregular NECMA border and covered no significant population centers. The originally proposed extensions of Cells 005, 006, and 007 were more significant. Northeast initially proposed to extend cell 005 34.9 square miles into the Lewiston NECMA, constituting 8.7 percent of the entire cell and 7.3 percent of the Lewiston NECMA. Cell 006 originally extended 20.9 square miles into the Lewiston NECMA and 20.8 square miles into Maine RSA 3, constituting 20.9 percent of the entire cell, 4.6 percent of the Lewiston NECMA, and 0.85 percent of Maine RSA 3. Originally, Cell 007 extended 6.7 square miles into the Lewiston NECMA which constituted only 2.8 percent of the 39 dBu contour of that cell and 1.4 percent of the Lewiston NECMA. In its initial application, Northeast offered the following explanation for its proposed extensions at Exhibit No. 3:

> The proposed CGSA has no extensions outside of the NECMA. The extensions of the 39 dBu contours of the

base station sites are *de minimis* in that the area of the extensions encompasses 141 square miles which is 13 percent of the total NECMA area and 13 percent of the total CGSA area. The proposed CGSA does not extend into a central MSA as expressly prohibited in Section 22.903(a). The purpose of the extension is to provide coverage within the MSA and not to provide service outside it.

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The irregularly shaped NECMA border and the provision of contiguous highway coverage within the NECMA gives rise to the design proposed here. The area encompassed by the 39 dBu contours of the cells are necessitated by desire to serve area within the Portland ME NECMA. The design proposed here is necessary in order to provide quality service specifically along U.S. Highways 1, 201 and 302; State Highways 35, 125, 117, 26, 100, 9, 196, 125, 24 and 197; and Interstate Highway 95 as well as other routes leading into the NECMA of Portland, ME.

19. We find that the 39 dBu contour extensions proposed by Northeast in its original application were *de minimis* and that its engineering explanation—relying on irregular boundaries and service within the Portland NECMA, particularly highways therein—was acceptable. In addition, the cumulative magnitude of the extensions is not significant in light of the overall facts. The most significant cumulative extension, into the Lewiston NECMA, constituted only 8.7 percent of the area of the Lewiston NECMA. Moreover, these extensions are not contiguous.[22] Thus, Northeast's original application was not defective.

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[22] This is in stark contrast to Saco River's application, which covered 57 percent of the population and 41 percent of the area of the Lewiston NECMA.

20. On May 31, 1991, Northeast filed an amendment with the Commission, which, *inter alia*, modified its original engineering proposal.[23] Because Northeast's application as originally filed was acceptable, this amendment was not an impermissible attempt to correct a defect. Moreover, the amendment filed by Northeast did not contain substantial modifications to its technical proposal. It included only minor site changes necessitated by subsequent developments regarding site availability, and did not increase the proposed CGSA. Thus, Northeast's amendments constituted permissible minor amendments. *See* 47. C.F.R. § 22.23(c). We will, therefore, consider Northeast's application as amended.

21. With respect to the amended contours, Cell 001 contains no contour extensions. With respect to Cell 002, we note that the extension goes 2.8 square miles into the Portsmouth NECMA, and constitutes only 1.7 percent of the area of the entire cell and less than 1 percent of the Portsmouth NECMA. The cell extends into an area where there is an irregular NECMA boundary and does not appear to serve any significant population centers within the Portsmouth NECMA. Northeast has used a directional antenna to minimize the extension area. Cell 003 extends 5.1 miles into the Lewiston NECMA. The extension constitutes only 1.4 percent of the area of the entire cell and only 1 percent of the Lewiston NECMA. Again, there is an irregular NECMA boundary at the extension area and the extension does not appear to cover any significant population centers within the Lewiston NECMA. Within the Portland NECMA, Northeast has used reduced power to minimize the extension area. Cell 004 extends 3.3 miles into the Lewiston NECMA. This extension constitutes 1.2 percent

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[23] Northeast filed an additional amendment on October 25, 1991. This amendment modified only Cell 001 by lowering the proposed tower to meet Federal Aviation Administration requirements. This amendment also corrected the coordinates for the originally proposed location of Cell 002. *See* discussion ¶¶ 26-7, *infra.*

of the area of the entire cell and less than 1 percent of the Lewiston NECMA. The extension area extends into an area where there is an irregular NECMA boundary and does not appear to cover any significant population centers within the Lewiston NECMA. Northeast has used a directional antenna to minimize the extension area. The amended extensions for Cells 002, 003, and 004 are clearly *de minimis* and well justified.

22. The extensions from amended Cells 005, 006, and 007, as with the original contours, are more significant. Nevertheless, we conclude they are de minimis and justified. Cell 005 extends 36.3 square miles into the Lewiston NECMA, which constitutes 9.1 percent of the area covered by the cell. The extension area covers less than 1 percent of the population of the Lewiston NECMA, however, and only 7.6 percent of its land area. Moreover, the NECMA boundary is irregular, the cell serves an area of the Maine Turnpike within the Portland NECMA that is close to the border of the Lewiston NECMA, and Northeast has used a directional antenna to minimize the extension area. Cell 006 extends 46.4 square miles outside the Portland NECMA—25.4 square miles into the Lewiston NECMA and 21 square miles into Maine Rural Service Area (RSA) 3. While this is 23.3 percent of the area of the cell, there is an irregular NECMA boundary and Northeast has used a directional antenna to minimize the extension area. The extension is only 5.3 percent of the area of the Lewiston NECMA and only 4 percent of the area of Maine RSA 3, and does not appear to cover any significant population centers therein. Finally, Cell 007 extends 49.2 square miles into Maine RSA 1. While this is 20.3 percent of the area of the cell, there is an irregular MSA boundary and Northeast has used a directional antenna. The extension covers only 1.3 percent of the area, and 5.2 percent of the population, of Maine RSA 1.

23. In sum, we conclude that each of Northeast's amended contour extensions is also *de minimis* and justified. The Portland NECMA has irregular borders and Northeast has

clearly designed its system to cover the Portland NECMA and not adjacent areas. In addition, the cumulative magnitude of the extensions is not significant in light of the overall facts. The most significant cumulative extension, into the Lewiston NECMA, constitutes only 15 percent of the area, and 7.3 percent of the population, of the Lewiston NECMA. Moreover, these extensions into the Lewiston NECMA are not contiguous. Thus, Northeast's application, as amended, is not defective.

b. Wireline Eligibility

24. We also reject the petitioners' argument that Northeast is not eligible for a wireline license because it is no longer a carrier engaged directly or indirectly in the business of providing public landline message telephone service. Pine Tree Tel and Tel is a wireline telephone operating company with access lines in three telephone exchanges, all of which serve the Portland NECMA. At the time Northeast's application was filed, PTT was a wholly owned subsidiary of Pine Tree Tel and Tel. While Saco River admits that through second-tier ownership by Pine Tree Tel and Tel, Northeast was eligible to apply for the wireline cellular system in Portland, it maintains that the subsequent sale of PTT to Timothy Hutchison changes the status of Northeast as a carrier.

25. Section 22.902(b) of the Rules states that "[c]ommon carriers engaged directly or indirectly in the business of affording public landline message service will be assigned frequencies from Cell System B in those areas in which they provide such landline service in some portion of the cellular market . . ." 47 C.F.R. § 22.902(b). The net changes in ownership of Hutchison, PTT, Pine Tree Tel and Tel, and Northeast are of no legal significance under the rules because there has been no cognizable shift in control. On the face of the application, Hutchison remains in control of PTT, Pine Tree Tel and Tel, and Northeast. The question of whether an applicant that is controlled by an individual who also controls a telephone

company is an eligible wireline carrier is a case of first impression. The cases cited by Saco River do not present factual situations similar to the one at issue here. We conclude that an applicant is eligible in this situation because the individual (here, Mr. Hutchison) can, through his control of the telephone company, be reasonably deemed to be the repository of the expertise and experience of the telephone company that underlies the wireline set-aside. The general partner of the applicant is a subsidiary of a landline company. By definition of the Rule, the applicant is indirectly in the business of affording public landline message service. They are in control of the eligible carrier. Indeed, Saco River's argument, if accepted, would lead to the conclusion that the cellular subsidiaries of the Bell Regional Holding Companies are ineligible to be wireline licensees, contrary to the Commission's clear intent.

c. Real Party in Interest

26. In addition, we find Port Cell's allegations that either USCC or TDS controls Northeast to be unsupported. Neither of the two factual assertions of Port Cell—that USCC owns a 48.51 percent limited partnership interest and that Northeast's finances are available only through guarantees of USCC or TDS—raises a *prima facie* case that USCC or TDS is in control of Northeast. *WWOR-TV, Inc.*, 6 FCC Rcd 193 (1990); *Contel Corporation*, 6 FCC Rcd 1003 (1991). Accordingly, no evidentiary hearing is required under 47 U.S.C. § 309(d). *See also Astroline Communications Company Limited Partnership v. FCC*, 857 F.2d 1556, 1557 (D.C. Cir. 1988). Moreover, even if a *prima facie* case had been presented, Northeast's response makes it clear that no substantial and material questions of fact exist on this issue. *See* 47 U.S.C. § 309(d); *Astroline*.[24]

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[24] In response to a letter from the Deputy Chief, Mobile Services Division, to Alan Naftalin, counsel to Northeast, (dated Feb. 7, 1992), Northeast provided an affidavit and other detailed materials showing that Mr. Hutchison has always been and remains in control of Northeast, distinguish-

d. Site Availability

27. Section 22.15(a)(1) of the Rules requires that "[a]pplications for fixed stations shall list the proposed antenna sites. The applicant shall have obtained reasonable assurance that it can use the site." The *Revision and Update of Part 22 of the Public Mobile Radio Service Rules, Report and Order,* 95 FCC 2d 769 (1983), stated that at the time an application is filed the applicant must determine that there is space available on an existing building or tower, or, if a new structure is to be built, that the property is available for such use and that it is reasonable to anticipate that it may use this space. Northeast has filed options for all its cell sites dated prior to the date of its application. Northeast explains that the coordinates of its proposed Cell 002 in its application as originally filed were 43 degrees 46' 03" North Latitude, 70 degrees 33' 13" West Longitude and that it had an Option to Acquire Easement between Kenneth Smith and USCC. The actual location of the Smith property was 43 degrees 46' 20" North Latitude, 70 degrees 32' 53" West Longitude, a miscalculation by Northeast's former consulting engineer. Because it was unable to renew the option on the Smith property in 1991, Northeast relocated Cell 002 to a nearby location.

28. On the basis of the record, we are persuaded that, when Northeast filed its application, it had received reasonable assurance of the site availability for its Cell 002, but that, through minor error, the coordinates noted in its application were incorrect. In addition, as explained by Northeast, three of the original cell sites, for Cells 001, 002, and 004, became

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ing the instant proceeding from the La Star Cellular Telephone Company proceeding, on which Port Cell in part relies, where the majority partner took no steps to maintain control. *See La Star Cellular Telephone Company,* 6 FCC Rcd 6860 (I.D. 1991), *aff'd,* 7 FCC Rcd 3762 (1992). We are satisfied that Mr. Hutchison has taken sufficient steps in his dealings with USCC and TDS to demonstrate his control.

unavailable and the options for the other cell sites expired.[25] Thus, at the time it filed its application, Northeast had reasonable assurance that its proposed sites were available and its application was not defective. In addition, since no substantial and material question of fact remains on this issue, an evidentiary hearing is not warranted. *See* 47 U.S.C. § 309(d); *Astroline.*

IV. CONCLUSION

29. Having reviewed the petition for reconsideration, the application for review, and petitions to dismiss or deny the application of Northeast, we affirm our decision in *Portland Cellular Partnership,* 6 FCC Rcd 2283 (1991), and find that Northeast Cellular Telephone Company, L.P. is financially, legally, technically, and otherwise qualified to become a Commission licensee. Petitioners have presented no basis for overturning our conclusions in the *Port Cell Remand Order.* We will, however, modify that Order to terminate Port Cell's interim operating authority only when Northeast is ready to begin providing service. We believe that this approach will best serve the public interest because it will prevent any interruption of service on the wireline frequency block in the Portland NECMA. To facilitate the transition, Northeast shall notify Port Cell of its intention to commence service no less than 10 days prior to commencement of such service.

V. ORDERING CLAUSES

30. Therefore, for the foregoing reasons, IT IS ORDERED THAT the application of Northeast Cellular Telephone Company, L.P. (File No. 27488-CL-P-152-B-86) IS GRANTED.

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[25] Following its designation as tentative selectee, Northeast renewed options for Cells 003, 005, 006, and 007 and obtained new options, at nearby locations, for Cells 001, 002, and 004.

Construction is not authorized at any location for which a final Federal Aviation Administration determination has not been submitted to the Commission and any required marking and lighting specifications have not been issued by the Commission. The authorization does not include the right to any interference protection in any areas outside the Portland, Maine, New England County Metropolitan Area and is further conditioned upon Northeast's coordinating with current and future licensees in adjacent markets and upon providing interference-free operations to licensees in those areas.

31. IT IS FURTHER ORDERED THAT the Application for Review and Petition for Reconsideration filed by Community Services Telephone Company ARE DENIED.

32. IT IS FURTHER ORDERED THAT the Petition for Reconsideration and Reinstatement of License filed by Portland Cellular Partnership IS DISMISSED.

33. IT IS FURTHER ORDERED THAT the Petitions to Dismiss or Deny filed by Portland Cellular Partnership and Saco River Cellular, Inc., ARE DENIED.

34. IT IS FURTHER ORDERED THAT the application filed by Community Service Telephone Co. (File No. 27414-CL-P-152-B-86) IS DISMISSED.

35. IT IS FURTHER ORDERED THAT Portland Cellular Partnership is granted interim operating authority to operate the Portland, Maine, wireline cellular system until Northeast Cellular Telephone Company, L.P. commences service.

FEDERAL COMMUNICATIONS COMMISSION
Donna R. Searcy
Secretary

FILED
JUL 15 1998
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SUPREME COURT, U.S.

No. 97-1838

In the Supreme Court of the United States

OCTOBER TERM, 1997

NORTHEAST CELLULAR TELEPHONE COMPANY,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

The public protection provision of the Paperwork Reduction Act, 44 U.S.C. 3512, has provided since 1980 that the public may not be penalized for failing to comply with a collection of information that has not been approved by the Office of Management and Budget. In 1995, Congress amended this statute to provide that the public protection provision "may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto." 44 U.S.C. 3512(b) (Supp. I 1995). The questions presented in this case are:

1. Whether the amendment to the Paperwork Reduction Act applies to cases that were pending before the Federal Communications Commission at the time the amendment was enacted.

2. Whether, if the amendment to the Paperwork Reduction Act applies to pending cases, it is nonetheless an unconstitutional congressional interference with a judicial judgment to apply it in a licensing case that has been remanded to the FCC by a court without any discussion or decision regarding any provision of the Paperwork Reduction Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1838

NORTHEAST CELLULAR TELEPHONE COMPANY,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 133 F.3d 25. The decision of the Federal Communications Commission (Pet. App. 24a-49a) is reported at 11 FCC Rcd 1997.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1998. A petition for rehearing was denied on March 19, 1998. Pet. App. 20a-23a. The petition for a writ of certiorari was filed on May 15, 1998. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1986, the Federal Communications Commission (FCC) held a lottery for a license to provide cellular service on Block B frequencies in Portland, Maine. Seacoast Cellular, Inc. (Seacoast), was selected first in the lottery, but amended its application to substitute the Portland Cellular Partnership (PortCell), which included Seacoast itself and some of the other applicants, as the tentative selectee. The Commission's rules required PortCell to submit a showing shortly after its announcement as the tentative selectee to demonstrate that it had a "firm financial commitment" of funds (consisting of a showing that a lender was committed to provide the necessary funding, the lender has assessed the selectee's credit worthiness, and the selectee and the lender agreed to the essential loan terms and conditions) necessary to build and operate its proposed system for a year. 47 C.F.R. 22.917(b) (1986). To satisfy that requirement, PortCell submitted a letter of credit from NYNEX Credit Corporation, the parent corporation of one of the PortCell partners.

Two other applicants for the Portland license, including petitioner Northeast Cellular Telephone Company, L.P., objected that PortCell was ineligible for the license because it failed to comply with the financial showing requirement of Section 22.917(b). The Commission agreed that the PortCell letter was deficient because it did not include the terms of the loan commitment and did not indicate that PortCell's credit worthiness had been assessed. *Portland Cellular Partnership*, 4 FCC Rcd 2050, 2051 (1989). However, the Commission concluded that there was good cause to waive the financial showing require-

ment because it was familiar with the source of PortCell's financing, NYNEX Credit, and was therefore confident PortCell was financially qualified. *Ibid.* PortCell's application was granted, and PortCell built and began to operate the cellular system. Northeast and another applicant appealed.

2. The court of appeals held that "[t]he agency failed to state any legitimate basis for granting PortCell a waiver from the Commission's financial qualifications requirements." *Northeast Cellular Telephone Co., L.P.* v. *FCC*, 897 F.2d 1164, 1167 (D.C. Cir. 1990). The court explained that "[a]bsent a finding that [specific information regarding NYNEX] was considered and used in formulating an articulable standard at the time the waiver was granted, the FCC must disqualify Port Cell's application." *Ibid.* Therefore, the court held that the Commission's waiver decision was "arbitrary and capricious because it was not based on any rational waiver policy." *Ibid.* The court accordingly "vacated and remanded" the FCC's order. *Ibid.*

3. On remand, the FCC concluded that it could not justify a waiver of the financial showing requirement and dismissed PortCell's application. *Portland Cellular Partnership*, 6 FCC Rcd 2283 (1991) (*Remand Order*). Northeast was designated the new tentative selectee, and PortCell was allowed to continue to operate the system until Northeast was ready to begin operating. *Id.* at 2284.

Pursuant to the Communications Act and the FCC's regulations, another applicant for the Portland license timely petitioned the Commission for reconsideration of the *Remand Order*. Later, PortCell also sought FCC reconsideration of the *Remand Order*, arguing for the first time that the require-

ment that it make a showing of a firm financial commitment violated the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Since its enactment in 1980, the Paperwork Reduction Act has provided that "[n]otwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information" that was not approved by OMB. 44 U.S.C. 3512. See *Dole* v. *United Steelworkers*, 494 U.S. 26, 40 (1990). PortCell asserted that the FCC had imposed the firm financial commitment requirement of Section 22.917(b) without obtaining the approval of OMB. Accordingly, PortCell argued that it could not be penalized for failing to satisfy that requirement.

The Commission dismissed PortCell's petition for reconsideration because it was filed more than 30 days after the *Remand Order*. 47 U.S.C. 405 (petitions for reconsideration must be filed within 30 days). *Portland Cellular Partnership*, 8 FCC Rcd 4146, 4146 n.4 (1993). In this order the Commission also denied the other pending petition for reconsideration (*id.* at 4149-4150) and granted Northeast's application. *Id.* at 4150-4152. PortCell petitioned for further reconsideration of the dismissal of its application, again raising its Paperwork Reduction Act objection. The Commission denied that petition, explaining that its arguments were "grossly untimely." *Portland Cellular Partnership*, 9 FCC Rcd 3291, 3292 (1994).

In a separate petition, PortCell timely sought reconsideration of the grant of Northeast's application, arguing that Northeast was not qualified to hold the Portland cellular license. The petition alleged that Northeast was in fact controlled by a large firm that had a substantial interest in Northeast but was

ineligible for the license, rather than by Mr. Timothy Hutchison, who purported to control Northeast and was eligible for the license. The Commission deferred action on this petition for reconsideration. 9 FCC Rcd at 3291 n.2. Notwithstanding the pending petition, Northeast constructed its cellular system and began operations (Pet. App. 6a), at which time PortCell ceased its operations.

5. In 1995, while the licensing proceedings remained pending before the Commission, Congress reenacted and revised the Paperwork Reduction Act. Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163. The 1995 Act retained the provision under Section 3512—now denominated Section 3512(a) —that no person could be subject to any penalty for failing to comply with an unauthorized information collection. The 1995 Act added, however, in a new Section 3512(b) that this protection could "be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto." § 2, 109 Stat. 181.

6. Shortly after the 1995 Act became effective, PortCell filed a motion to reinstate and grant its application. It argued it could do so under Section 3512(b) because a violation of the Paperwork Reduction Act could be raised "at any time" while the administrative proceeding was pending, and petitions for reconsideration were still pending in this matter before the Commission. In November 1996, the Commission agreed. Pet. App. 24a-47a. It concluded that the amended Section 3512 applied to the pending PortCell proceeding, based on the clear congressional intent that the 1995 amendment applies to pending cases. Pet. App. 33a-34a. The Commission also re-

jected a claim that to entertain the Paperwork Reduction Act defense would nullify the court of appeals' *Northeast Cellular* decision, contrary to *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

The Commission reinstated and then granted PortCell's application based on PortCell's amendment that now showed a firm financial commitment. Pet. App. 39a. In doing so, the Commission rejected Northeast's complaint that PortCell had solicited impermissible *ex parte* contacts with the agency. *Id.* at 39a-44a. Northeast was permitted to continue to operate until PortCell was ready to recommence service. *Id.* at 45a-46a. In light of that disposition, the Commission dismissed as moot PortCell's petition for reconsideration that raised questions concerning the identity of the party that controlled Northeast and Northeast's qualifications to hold the Portland cellular license. *Id.* at 46a, 47a.

7. The court of appeals rejected all of Northeast's arguments challenging the Commission's reinstatement and grant of PortCell's application. Pet. App. 1a-17a. It agreed with the Commission that Section 3512 of the amended Act permitted a violation of the Act to be raised "without limitation." Pet. App. 8a. The court noted that because Section 3512 applies "notwithstanding any other provision of law" it "simply trumps" any restrictions in the Communications Act on the timeliness of raising arguments. Pet. App. 9a, quoting Pet. App. 32a-33a. Rejecting the argument that the application of Section 3512(b) would have an impermissible retroactive effect, the court explained that because

> § 3512(b) governs only the conduct of litigation after the effective date of the statute and does

> nothing to reopen matters litigated before that date, it does not offend any norm against retroactive lawmaking.
>
> Nor is a statute retroactive "merely because it is applied in a case arising from conduct antedating the statute's enactment [* * *] or upsets expectations based in prior law." *Landgraf* v. *USI Film Prods., Ltd.*, 511 U.S. 244, 269 (1994). By permitting parties to raise the [Paperwork Reduction Act] issue 'at any time' in ongoing proceedings, the statute does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. Rather, it simply prevents an agency or court from refusing to consider a [Paperwork Reduction Act] argument on the ground that it is untimely.

Pet App. 10a.

The court of appeals also rejected petitioner's argument that application of Section 3512(b) in this proceeding would be unconstitutional under *Plaut*, because it would nullify a final judgment in a prior case—the court of appeals' earlier *Northeast Cellular* decision resulting in the remand to the FCC. Pet. App. 10a-11a. The court reasoned that application of the revised Paperwork Reduction Act did not unconstitutionally nullify a final judgment, both "because no party in *Northeast [Cellular]* raised, and we did not purport to resolve, the [Paperwork Reduction Act] issue," and because the *Northeast Cellular* court did not in any event "render a final judgment terminating the case" but instead "remanded it to the Commission for further proceed-

ings." *Id.* at 11a. The court of appeals concluded that, in the proceeding on remand, the Commission simply applied the rule that "each court, at every level, must 'decide according to existing laws.'" *Ibid.*, quoting *Plaut*, 514 U.S. at 226 (quoting *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102, 109 (1801)).

ARGUMENT

This is a unique case arising under the Paperwork Reduction Act that is unlikely to recur, that does not raise any issue of general importance warranting this Court's review, and is not in conflict with any decision of this Court or any other court of appeals. Moreover, it is not clear that petitioner would benefit from its effort to disqualify PortCell, in view of the unresolved issue of petitioner's own qualifications. Further review is therefore not warranted.

1. Under 44 U.S.C. 3512(a) (Supp. I 1995), if an agency promulgates an information collection without OMB approval, "members of the public may ignore it without risk of penalty." *United Steelworkers*, 494 U.S. at 40. Because that provision applies "notwithstanding any other provision of law," it overrides contrary provisions of other statutes and regulations. 44 U.S.C. 3512(a) (Supp. I 1995). When Congress reenacted and revised Section 3512 in 1995, Congress strengthened its protection by making clear that the public should be able to take advantage of its protection "at any time" during pending administrative or judicial proceedings. 44 U.S.C. 3512(b) (Supp. I 1995). See 141 Cong. Rec. S5275 (daily ed. Apr. 6, 1995) (statement of Senator Roth, co-sponsor of 1995 Act) ("[T]he protection of Section 3512 may be raised at any time during the life of the matter."); 141 Cong.

Rec. H4376 (daily ed. Apr. 6, 1995) (statement of Rep. Clinger) (same).

This proceeding began prior to the 1995 reenactment and revision of the Paperwork Reduction Act, and it was still pending before the Commission when the 1995 Act went into effect on October 1, 1995. The lengthy procedural history of this case, see pp. 2-8, *supra*, indicates that similar cases are unlikely to recur. We are not aware of any other proceedings before the federal government or in any court that would raise the same questions under the Paperwork Reduction Act that petitioner seeks to bring before the Court. The Commission and the court of appeals correctly addressed the application of the reenacted and revised Paperwork Reduction Act to this continuing proceeding. For those reasons, review by the Court is not warranted.

2. Petitioner contends (Pet. 14-21) that application of Section 3512(b) to this proceeding nullifies the court of appeals' prior decision in *Northeast Cellular*, in contravention of this Court's decision in *Plaut*. That contention is mistaken, for three reasons.

a. First, the rule of *Plaut* has no application to licensing and other proceedings in which the relief sought is essentially prospective. The issue in this case does not concern a party's right to a money judgment as compensation for a past wrong—as in *Plaut*, see 514 U.S. at 218-219—but a party's qualifications to operate as a cellular telephone licensee in the future. As this Court recognized in *Plaut*, it has long been settled that Congress may "alter[] the prospective effect of injunctions entered by Article III courts," *id.* at 232, citing *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856). The same principle applies to licensing

proceedings. Thus, even if Congress had enacted a statute altering —or eliminating—the very law that had been the basis of the court of appeals' decision in *Northeast Cellular*, that statute would be fully applicable in proceedings like this, in which the ultimate determination of what party obtains the license has an entirely prospective effect.

b. Second, *Plaut* in any event has no application because the newly enacted statute in this case had nothing to do with the court of appeals' judgment in *Northeast Cellular*. Unlike in *Plaut*, where the newly enacted statute essentially lengthened the statute of limitations to revive cases that had already been dismissed based on a shorter limitations period, Congress did not alter the Commission's financial qualifications requirements that were construed in *Northeast Cellular*. Instead, Congress reenacted and revised the Paperwork Reduction Act. The court of appeals in *Northeast Cellular* was not presented with, did not discuss, and did not decide any question regarding the application of the Paperwork Reduction Act. Accordingly, Congress took no action that affected the judgment of the court of appeals in *Northeast Cellular*, and application of the reenacted Paperwork Reduction Act could not violate the rule of *Plaut*.

c. Third, unlike in *Plaut*, where the prior lawsuit was completed at the time Congress attempted to revive it, in this case there was no "last word of the judicial department," *Plaut*, 514 U.S. at 227, that is protected by the separation of powers concerns articulated in *Plaut*. The *Northeast Cellular* decision did not itself terminate proceedings regarding the cellular license, nor could it have done so. Instead, it remanded the case to the Commission,

which "means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law." *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 374 (1939). Such action, which included resolution of timely filed challenges to petitioner's own qualifications, remained pending before the agency when the Paperwork Reduction Act was reenacted and revised.[1]

Even without further congressional action, the administrative proceedings on remand could have resulted in an alteration of the rule of law announced by the judicial department in *Northeast Cellular*. For example, PortCell had the right to challenge any dismissal of its application on remand in a new appeal to the District of Columbia Circuit, 47 U.S.C. 402(b), and thereafter, if necessary, in a petition for certiorari to this Court. In such a post-remand appeal, there remained the possibility that the court of appeals could reconsider its *Northeast Cellular* holding and agree with PortCell that the court erred in its construction of the Commission's financial qualification requirements. Even if the court of appeals adhered to *Northeast Cellular*, this Court on certiorari from any such later appeal could rule on the validity of the remand instructions given to the Commission by the court of appeals in *Northeast Cellular*. *E.g.*, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 488 n.6 (1968); *Mercer* v. *Theriot*, 377 U.S. 152, 153-154 (1964) ("[I]t is

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[1] The 1995 amendment of the Paperwork Reduction Act permits violations of the Act to be raised "at any time" only in proceedings still pending before an agency or the courts. 44 U.S.C. 3512(b) (Supp. I 1995). It therefore does not permit the Paperwork Reduction Act defense to be raised when an underlying proceeding is no longer pending.

settled that we may consider questions raised on the first appeal, as well as 'those that were before the Court of Appeals upon the second appeal.'"), quoting *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257 (1916); see also *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955) (this Court may "consider all of the substantial federal questions determined in the earlier stages of the litigation"); *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) ("A petition for writ of certiorari can expose the entire case to review."), citing *Panama R.R.* v. *Napier Shipping Co.*, 166 U.S. 280, 283-284 (1897). *Plaut* itself recognized that in a situation like this, Congress can properly enact new law that applies to pending cases. 514 U.S. at 226-227, citing *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801), and *Landgraf* v. *USI Film Products, Ltd.*, 511 U.S. 244 (1994).

d. None of petitioner's attempts to endow the court of appeals' remand order in *Northeast Cellular* with the kind of "finality" necessary to trigger the rule of *Plaut* is persuasive.

Petitioner attempts to rely (Pet. 5, 19) on Section 402(j) of the Communications Act of 1934, 47 U.S.C. 402(j), to establish that the court of appeals' decision was "the last word of the judicial department" under *Plaut*.[2] That reliance is misplaced. In discussing the counterpart to Section 402(j) in the Federal Power Act, this Court has explained that the purpose of such

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[2] Section 402(j) provides that the judgment of the court of appeals on review of an FCC decision "shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari * * *, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court."

statutes is to "preclude[] *de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review." *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). Thus, "all objections to the [administrative] order * * * must be made in the Court of Appeals or not at all." *Ibid.* In the absence of a petition for certiorari in *Northeast Cellular*, the judgment of the Court of Appeals would therefore become "final" under Section 402(j), in the sense that it would finally settle the question whether the Commission's order was enforceable at that time or instead had to be remanded to the Commission; no further litigation of that question in any other forum or by any other means would be permissible. Section 402(j), however, does not have the peculiar effect, attributed to it by petitioner, of having given the *Northeast Cellular* court authority—indeed requiring that court—to finally settle the question of which party must be awarded the cellular license. The court's remand order expressly and quite properly left that question open. And, as we have explained, even that decision remained subject to review by this Court in a later-filed petition for certiorari from a final judgment (which could possibly have led to a decision by this Court that the further proceedings on remand had been legally superfluous).

Petitioner also attempts to rely (Pet. 18) on the Court's statement in *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6 (1987), that "[b]y 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." That definition of "finality" was cited in *Plaut*. See 514 U.S. at 214. The *Griffith*

definition, however, implicitly makes clear that where there has been a remand—*i.e.*, where *no* judgment of conviction or the like has yet been rendered that purported to terminate the controversy —"finality" in the relevant sense is not present.

e. Contrary to petitioner's contention (Pet. 15-18), there is no conflict between the court of appeals' decision in this case and the First Circuit's decision in *United States* v. *Vazquez-Rivera*, 135 F.3d 172 (1998). In *Vazquez-Rivera*, the court of appeals had previously remanded an appeal from a final judgment in a criminal case for resentencing, because the record had not been developed sufficiently to support a particular sentencing enhancement. While the case was on remand, the district court applied a newly-enacted statute broadening the enhancement to cases like the one before the court. On a second appeal, the court of appeals held that applying the new provisions "to appellant for the crime for which he was convicted violates the ex post facto clause of the Constitution." 135 F.3d at 177.

Initially, the First Circuit's holding in *Vazquez-Rivera* rested squarely on the Ex Post Facto Clause, not on the separation of powers principles of *Plaut*. In addition, whereas the First Circuit in its original decision had squarely and definitively construed the very sentencing enhancement provision that Congress amended, in this case the original D.C. Circuit decision did not in any way address the statute that Congress reenacted and revised—the Paperwork Reduction Act—and whose application on remand is at issue.[3] Finally, the First Circuit's decision in

[3] For this reason, the First Circuit's citation to *Plaut* does not suggest any conflict in reasoning with the D.C. Circuit's

Vazquez-Rivera involved an appeal from a final judgment in a criminal case regarding the legal consequences of the defendant's wholly past conduct; in this case, as noted above, the appeal arose from a licensing proceeding in which the ultimate issue has at all times been whether petitioner or some other party will have the right to operate as a cellular telephone licensee in the future.

3. Petitioner errs in contending (Pet. 22-29) that the D.C. Circuit's holding that Section 3512(b) applies to pending cases is contrary to this Court's decision in *Landgraf* v. *USI Film Products, Ltd.*, 511 U.S. 244 (1994).

a. Petitioner does not dispute that where Congress has clearly indicated its intent that a new statute apply in pending cases, that intent governs even if the new statute thereby operates retroactively. *Landgraf*, 511 U.S. at 280. The requisite intent is present here. The statute at issue provides that a party should be allowed to raise a Paperwork Reduction Act defense "at any time during" an ongoing administrative proceeding, which includes the right to raise the defense for the first time on judicial review of the proceeding. 44 U.S.C. 3512(b)

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decision in this case. In the course of discussing whether to give weight to Congress's characterization of the new statute as a "clarification" of its intent in the original legislation, the First Circuit cited *Plaut* to support the conclusion that "post hoc statements regarding the original legislative intent do not affect this court's previous, and final, finding as to what that intent was." 135 F.3d at 177. Because *Northeast Cellular* did not contain a "previous, and final, finding" regarding any aspect of the Paperwork Reduction Act, the D.C. Circuit's decision in this case is in no way inconsistent with the First Circuit's conclusion.

(Supp. I 1995). Congress thus made clear that the Paperwork Reduction Act defense should be available regardless of ordinary waiver rules requiring the defense to be raised at some specific stage in the proceedings. In other words, Congress intended that making the defense available was more important than the need to respect any expectations that the parties to a given case may have developed, based on ordinary waiver or procedural default rules. In light of that expressly stated intent, the Commission and the D.C. Circuit quite properly concluded that this procedural change should be applied to cases pending at the time it was adopted.

Legislative history is also relevant in determining congressional intent with respect to the application of a new statute to a pending case. *Landgraf*, 511 U.S. at 262-263. When the House of Representatives adopted the Conference Report on the reenactment of the Paperwork Reduction Act, there was a colloquy between Representative Crapo, the original sponsor of the bill adding the "at any time" language to the Paperwork Reduction Act, and the bill's floor manager, Representative Clinger. Representative Crapo asked, "[I]s it the chairman's understanding that section 3512 will become effective as of October 1, 1995, and will apply to all cases then pending before the Federal agencies or the courts?" 141 Cong. Rec. H4376 (daily ed. Apr. 6, 1995). Representative Clinger replied, "Mr. Speaker, the gentleman is absolutely correct. As of October 1, 1995, the defense provided in section 3512 is available at any time in an ongoing dispute." *Ibid.* Because Congress clearly intended that the revised Paperwork Reduction Act should apply in cases pending on the Act's effective date, it is unnecessary for the Court to consider petitioner's

argument concerning the rules governing retroactivity where the congressional intent is not clear.

b. Moreover, petitioner's view on the proper standard for determining when the application of a new procedural rule in a pending case would be retroactive is based on a misreading of *Landgraf*. Contrary to petitioner's argument, *Landgraf* does not hold that the application of a new procedural statute in a pending case is retroactive whenever the previously governing procedural rule on the matter at issue has already been the subject of a decision by a tribunal. *Landgraf* instead recognized that "[b]ecause rules of procedure regulate secondary rather than primary conduct," new procedural rules "may often be applied in suits arising before their enactment without raising concerns about retroactivity." 511 U.S. at 275; see also *Lindh* v. *Murphy*, 117 S. Ct. 2059, 2063 (1997) (noting "the natural expectation" for "merely procedural" rules to "apply to pending cases"). Here, of course, the legal standard that governed PortCell's primary conduct at the time it occurred remains unchanged, and only the procedures affecting adjudication of that conduct under that standard in an ongoing case have been altered.

The Court in *Landgraf* did note that as a matter of "common-sense," new procedural rules sometimes should not be applied to pending cases. 511 U.S. at 275 n.29. It gave two examples of such cases, explaining that "[a] new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial." *Ibid.* But the Court did not suggest that new procedural rules generally should not be applied in any case in

which a tribunal had already reached a ruling based on a different procedural rule on the point.[4] To the contrary, the Court cited *Collins* v. *Youngblood*, 497 U.S. 37 (1990), as an example of the proper application of "intervening procedural changes" in pending cases. See *Landgraf*, 511 U.S. at 275 n.28. In *Collins*, a new statute allowing the reformation of an improper jury verdict was applied after a lower court had already concluded prior to the adoption of the new statute that the only remedy for the improper jury verdict was a new trial. Just as in *Collins*, it does not offend "common-sense" to apply the new procedural rule—contained in the reenacted and revised Paperwork Reduction Act—to PortCell's case.

c. Contrary to petitioner's contention (Pet. 26-27), the court of appeals' ruling does not conflict with this Court's decision in *Hughes Aircraft Co.* v. *United States*, 117 S. Ct. 1871 (1997). The court of appeals held that Section 3512(b) "merely required the Commission, when the [Paperwork Reduction Act] issue was raised anew," to rule on the merits of that issue. Pet. App. 9a-10a. Applying Section 3512(b) to pending cases would therefore not be retroactive

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[4] Petitioner's argument that the "old" procedural rule had been "applied" in this case in the relevant sense is in any event doubtful. This Court has never held that the retroactivity analysis applicable to procedural changes in administrative proceedings is identical to the analysis applicable to changes in judicial procedure. Yet here, the only "application" of the old procedural rule prior to Congress's adoption of the reenacted and revised Paperwork Reduction Act had been by the Commission—not by any court. Although the Commission had concluded that PortCell's earlier Paperwork Reduction Act defense was untimely, that decision had not been judicially reviewed at the time the reenacted and revised Act became effective.

because, so understood, Section 3512(b) "governs only the conduct of litigation after the effective date of the statute and does nothing to reopen matters litigated before that date." Pet. App. 10a. Nothing in that ruling is inconsistent with this Court's decision in *Hughes*, *Landgraf*, or any other case.

To support its conclusion that the application of Section 3512(b) to pending cases would not be retroactive, the court of appeals also noted that such application did not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Pet. App. 10a (quoting *Landgraf*, 511 U.S. at 280). In *Hughes*, this Court stated that it is not the case that "*only* statutes with one of these effects are subject to [the] presumption against retroactivity." 117 S. Ct. at 1876. The court of appeals did not in any way challenge that ruling; it merely held that the fact that a law (here, Section 3512(b)) does not have one of the listed effects supports—even if it does not conclusively establish—the conclusion that the law is not impermissibly retroactive.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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The Petition presents two profound questions implicating the independence of the Judicial Branch against *post hoc* interference by the Legislative Branch. The FCC has essentially taken the position that the Judicial Branch—far from being a coequal branch of the federal government, as contemplated by the Framers—is actually quite subordinate to the political branches. This is so because, on the FCC's view, the power of the federal courts to decide the cases before them is subject always, save only in constitutional cases, to a congressional power to revise those judgments (and the processes that produced them) by later statute. The Court should grant certiorari to address these questions and their serious ramifications for the Judicial Branch.

1. For all its bold assertions as to Congress's self-proclaimed power essentially to sit as a supreme court of errors in statutory cases, the FCC's first tack is to paper over the obvious importance of the issues presented and the ramifications of the holding below for the federal court system as a whole rather than defend its crabbed view of judicial authority. The FCC asserts (Opp. 8) that this case "does not raise any issue of general importance." The Department of Justice was more forthright in the court below, where it opened the brief *amicus curiae* of the United States with the assertion that "[t]his case presents an important question concerning the interpretation and application of the Paperwork Reduction Act of 1980 ('PRA'), 44 U.S.C. [§] 3501 *et seq.*"[1]

The government's representation from the court below, not the FCC's convenient assertion in this Court, is correct. Simply put, the extreme position taken by the government in this case, and endorsed by the court below, strikes at the very heart of the judicial function under Article III. It has long been clear that this Court's function is "to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). This function encompasses "the power, not merely to rule on cases, but to

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[1] Brief of the United States, *Amicus Curiae*, at 1, *Saco River Cellular, Inc.* v. *FCC*, D.C. Cir. No. 91-1248 (filed July 1997).

decide them," *i.e.*, to " 'render *dispositive* judgments.' " *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (emphasis added).

It was this core judicial power that the D.C. Circuit exercised in 1990 when it reversed the FCC's "outrageous" decision and ordered that "the FCC *must* disqualify Port Cell's application" absent certain specified record evidence that all agree did not exist (Pet. 5-6). *Northeast Cellular Tel. Co.* v. *FCC*, 897 F.2d 1164, 1167 (D.C. Cir. 1990) (emphasis added). If Congress can set aside such an unequivocal ruling instructing an agency on how it must proceed, it is clear that *any* ruling on a nonconstitutional matter can be brushed aside by Congress in the very litigation in which it was rendered, a sweeping result that, both tellingly and astonishingly, neither the FCC nor PortCell disclaims. Obviously, a ruling that gives Congress the power to render decisions by this Court and all other courts advisory through later legislation—and, in so doing, to turn prevailing parties in litigation into losers—presents an issue worthy of this Court's review.

Unable to deny the effect of the ruling below, the FCC is left to argue that this is a "unique case arising under the Paperwork Reduction Act that is unlikely to recur." Opp. 8. The fact is, however, that the issues presented transcend the PRA and do recur with regularity. They can arise under *any* statute, and in *any* area of law.[2] It would

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[2] For example, courts have considered the effect of subsequent legislation on prior judgments in cases involving the securities laws (*Plaut, supra*), the federal carjacking statute (*United States* v. *Vazquez-Rivera*, 135 F.3d 172 (1st Cir. 1998)), prison litigation under 42 U.S.C. § 1983 (*e.g.*, *Hadix* v. *Johnson*, 133 F.3d 940 (6th Cir. 1998)), and the immigration laws (*Elramly* v. *INS*, 131 F.3d 1284 (9th Cir. 1997) (per curiam)). Similarly, Congress has fundamentally changed procedures applied in pending cases prior to enactment of the new statute in suits under the habeas corpus statute (*e.g.*, *Lindh* v. *Murphy*, 117 S. Ct. 2059 (1997)), Title VII (*e.g.*, *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994)), section 1983 (*e.g.*, *Garcia* v. *Silbert*, 141 F.3d 1415 (10th Cir. 1998)), and immigration statutes (*Reyes-Hernandez* v. *INS*, 89 F.3d 490 (7th Cir. 1996)). Of course, if this Court tolerates the leg-

therefore be a mistake for the Court to decline the opportunity to provide necessary guidance on these issues simply because this case involves the PRA.[3]

2. *Separation of Powers.* When it finally comes to terms with the court of appeals' reasoning on the separation of powers issue, the FCC offers a smattering of arguments not raised below, tellingly relegating the sole ground for decision offered to and adopted by the court of appeals—lack of finality—almost to an afterthought. In doing so, the FCC overlooks the fact that "[w]hile it is true that a respondent may defend a judgment on alternative grounds, we generally do not address arguments that were not the basis for the decision below." *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996). In any event, those arguments are unavailing.

a. The FCC asserts (Opp. 9) that *Plaut* is inapplicable here because the relief granted was "essentially prospective." This assertion is irrelevant because only one

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islative incursion here on the judicial power, there is every reason to expect Congress to intervene in adjudicated cases more often on behalf of politically powerful parties such as NYNEX and PortCell. *See The Federalist No. 48*, at 333 (James Madison) (Isaac Kramnick ed. 1987) (noting the legislative tendency to "extend[] the sphere of its activity, . . . drawing all power into its impetuous vortex").

[3] Incredibly, respondents suggest that it would be pointless to grant certiorari here because of what the FCC vaguely describes as an "unresolved issue of petitioner's own qualifications" for the Portland license (Opp. 8). This case, however, involves only the legality of the retroactive reinstatement and grant of *PortCell's* application, which does not depend on any issue regarding Northeast. In any event, respondents fail to acknowledge that the FCC squarely *rejected* PortCell's argument on that isue when it awarded the license to Northeast. *See Portland Cellular Partnership*, 8 FCC Rcd. 4146, 4152 (1993) (finding "Port Cell's allegations . . . to be unsupported," so much so as to fail to state even "a prima facie case" that would justify an evidentiary hearing on the matter); *see also id.* at 4152 n.24 (deeming steps taken by Northeast's majority partner "sufficient . . . to demonstrate his control"); *contra* PortCell Opp. 16. The FCC's ruling was unquestionably correct, respondents' speculation to the contrary notwithstanding.

type of final judgment of an Article III court is categorically subject to any degree of subsequent statutory revision, and that is an injunction. See *Plaut*, 514 U.S. at 232; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1856). This is so because injunctions—unlike other court decisions—by their very nature operate *in futuro*, imposing a "continuing" obligation that a party take (or refrain from taking) certain action, *id.*; therefore, to the extent a later-enacted statute alters "the prospective effect of injunctions," it does not operate retroactively. *Plaut*, 514 U.S. at 232. This case, of course, does not involve any injunction at all, but rather an appellate ruling setting aside an erroneous decision rendered by a lower tribunal. Such rulings are indeed subject to *Plaut*. See, *e.g.*, *United States* v. *Vazquez-Rivera*, 135 F.3d 172, 177 (1st Cir. 1998); *Elramly* v. *INS*, 131 F.3d 1284, 1285 (9th Cir. 1997) (per curiam); but see Pet. App. 13a.[4]

The FCC asserts (Opp. 9-10) that "[t]he same principle [underlying the injunction exception] applies to licensing proceedings." That sweeping assertion, however, is remarkable for its utter lack of support. If the FCC believes a new exception to *Plaut* is warranted, that is a reason to grant, not deny, certiorari here.

In addition, the FCC's contention that the relief ordered in this case is "entirely prospective" (Opp. 10) is wrong. The FCC did not merely order that henceforth PortCell, rather than Northeast, shall be the licensee for Portland, Maine. To the contrary, the FCC, in 1996, "rescind[ed] the [1993] grant of the application of North-

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[4] The FCC distinguishes *Vazquez-Rivera* as "rest[ing] squarely on the Ex Post Facto Clause" (Opp. 14). Later, however, the FCC is constrained to admit (Opp. 14 n.3) that the court relied on *Plaut* in rejecting the argument that the new sentencing provision did not violate the Clause because the amendment merely "clarifi[ed]" the intent underlying the original provision. The FCC's claim that there is no "conflict in reasoning" between the two decisions is misleading because the conflict is in the *holding*: *Vazquez-Rivera* held that an appellate decision that includes a remand can be "final" under *Plaut* (135 F.3d at 177), whereas the court below held that such a decision can never be final. Pet. App. 11a.

east" and "reinstate[d] *nunc pro tunc* and grant[ed] the application of Port[Cell]." Pet. App. 24a. This *nunc pro tunc* order means that the FCC, in addition to stripping Northeast of its right to continue holding its license in the future, took away Northeast's right to hold the license in the past, *i.e.*, from 1993 to 1996, which proves that the relief ordered does indeed have a major retroactive component. See *Black's Law Dictionary* 1069 (6th ed. 1990) (defining "*nunc pro tunc*" as "[a] phrase applied to acts allowed to be done after the time when they should be done, *with a retroactive effect, i.e.*, with the same effect as if regularly done") (emphasis added).

b. The FCC contends (Opp. 10) that even if *Plaut* were applicable, section 3512(b) "had nothing to do with" (and thus could not nullify) the *Northeast* decision. This assertion defies reality. Noting that "[t]here is no question here that Port Cell has failed to comply strictly with [the FCC's financial commitment] regulations" (897 F.2d at 1166), the *Northeast* court ruled that "the FCC *must* disqualify PortCell's application" absent specified record evidence justifying a valid waiver of the regulations. *Id.* at 1167 (emphasis added). Although respondents ignore that penultimate holding, perhaps in the hope that the Court will overlook it at the certiorari stage, they cannot make it go away. With the enactment of section 3512(b) in 1995, however, Congress plainly countermanded that judicial instruction with a statutory instruction, in effect, that despite *Northeast* the FCC need not—indeed, *must not*—disqualify PortCell's application. Thus, the court's instruction was indeed nullified by section 3512(b), as even the FCC concluded in 1994.[5] See *Portland Cellular Partnership*, 9 FCC Rcd. 3291, 3292 & n.3 (1994).

[5] For this reason, it is beside the point that *Northeast* "did not decide any question regarding the application of the [PRA]" (Opp. 10). As *Plaut* noted, federal courts do not simply answer legal questions presented to them in a particular case—they also *dispose of* the case. 514 U.S. at 218-19. As previously shown, the court of appeals' disposition in 1990 left open only one basis for salvaging

c. When the FCC finally gets around to defending the rationale of the court of appeals, it states (Opp. 10) that the *Northeast* decision necessarily was not final because "it remanded the case to the Commission." To its credit, the FCC does not adopt PortCell's demonstrably false claim (Pet. 18-19) that *Plaut* failed to define what constitutes a "final judgment" (PortCell Opp. 6); instead, the FCC correctly acknowledges (Opp. 13) that *Plaut* adopted the definition of finality from *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), which regards a lower court judgment as "final" when all appeals on direct review are foregone or completed. *Id.* at 321 n.6; see also *Plaut*, 514 U.S. at 227. Even though that line was plainly crossed in 1990 when the time for seeking certiorari from *Northeast* expired, the FCC somehow finds it "implicit[]" in that definition that a remand is not " 'final[]' in the relevant sense" (Opp. 14). This reflects mere wishful thinking on the FCC's part, which explains why it does not justify that assertion.[6]

PortCell's application. That disposition commands the protection of Article III as much as the legal analysis that led to it, which Congress itself recognized in requiring the FCC to give controlling effect to decisions such as *Northeast*. *See* 47 U.S.C. § 402(h), (j). Moreover, respondents' efforts to carve PortCell's PRA claim from the preclusive scope of the *Northeast* decision ignore the obvious fact (Pet. 20) that judicial judgments have *res judicata* effect and therefore bar not only claims that were actually decided, but also any and all claims that could have been presented for decision.

[6] Instead, the FCC (like PortCell, Opp. 6) purports to derive from *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 374 (1939), a categorical rule that a judgment that includes a remand is never final (Opp. 11). Clearly, however, *Ford* announced no such rule, but rather stated that the "familiar appellate practice to remand causes for further proceedings without deciding the merits . . . does not encroach upon administrative functions." 305 U.S. at 373-74. This statement is inapposite because *Ford* did not consider whether remand decisions can be considered "final" and because *Northeast* obviously did not remand "without deciding the merits," *id.* Although the FCC mistakenly focuses on "the question of which party must be awarded the cellular license" (Opp. 13), the relevant issue resolved by *Northeast* was whether *PortCell* could be awarded

Likewise unavailing is respondents' argument (Opp. 11-12; PortCell Opp. 6) that a lower court decision can never be final under *Plaut* as long as it is possible for a higher court, in proceedings other than on direct review, to revisit the holding. On respondents' exceedingly narrow view of the judicial power, *Plaut* would be a dead letter because it is *always* possible for a court decision—even a decision of this Court—to be reconsidered in collateral proceedings. See, *e.g.*, *Agostini* v. *Felton*, 117 S. Ct. 1997 (1997) (overruling, on motion to vacate judgment, Supreme Court ruling rendered twelve years earlier in the same case between the same parties). Not surprisingly, therefore, this Court has *rejected* the notion that its ability to grant certiorari in a later collateral proceeding denies finality to a ruling by a court of appeals in an earlier administrative agency appeal. See *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 341 (1958) (holding, in collateral proceeding challenging agency action upheld in prior review proceeding, that "the judgment of the Court of Appeals [affirming the agency order], upon this Court's denial of the [challenger's] petition for certiorari, became final").

Lastly, citing *City of Tacoma*, the FCC argues (Opp. 12-13) that although under *Plaut* "[f]inality of a legal judgment is determined by statute" (514 U.S. at 227), the court below properly disregarded 47 U.S.C. § 402(j), which states that appeals court rulings reversing and remanding FCC orders "shall be final" unless reversed on appeal by the Supreme Court. *Id.* *City of Tacoma* actually refutes the FCC's position, however. The case held that where, as here, a statute denominates an appeals court ruling as "final" subject to Supreme Court review, the ruling becomes final (and assumes *res judicata* effect) when it is not reviewed on direct appeal by this Court. 357 U.S. at 336-37, 341.

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the license absent a valid waiver of the financial qualifications requirement; the court ruled that it could not.

3. *Retroactivity*. As with the Article III issue, respondents defend the rationale of the court below on retroactivity only as a last resort, offering instead alternative grounds of decision. These arguments are unavailing.

a. PortCell argues that section 3512(b) was properly applied retroactively because "[t]here is no language even arguably excluding [its application to] pending cases" (PortCell Opp. 11). This argument is plainly wrong because *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), erects a presumption *against* retroactive application of statutes. PortCell's argument would turn *Landgraf* on its head by creating a presumption *favoring* retroactivity, which, as this Court has held, has no basis in law. *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 117 S. Ct. 1871, 1878 (1997).

The FCC, for its part, contends (Opp. 15-16) that the text of section 3512(b) clearly requires retroactive application. This argument, too, is incorrect. The FCC simply ignores Northeast's showing (Pet. 22-23) that the text does not at all address whether section 3512(b) applies to cases pending prior to its enactment, and thus does not remotely satisfy *Landgraf*'s "clear-statement rule." See *Lindh* v. *Murphy*, 117 S. Ct. 2059, 2062 (1997). As *Lindh* held, the presumption against retroactivity can be trumped only by "statutory language . . . so clear that it c[an] sustain only one interpretation," *i.e.*, that it must be applied to pending cases. *Id.* at 2064 n.4. The text of section 3512(b) falls considerably short of that level of clarity, as the FCC itself conceded in its order. See Pet. App. 33a (concluding that "the statute itself does not explicitly address this question").

b. Respondents consequently are forced to fall back on snippets derived from the legislative history of section 3512(b) for the support missing from the text for retroactive application of the statute (Opp. 16; PortCell Opp. 9-12). The FCC asserts (Opp. 16) that legislative history is "relevant" in applying the presumption against retroactivity. The FCC, however, does not explain how

that could possibly be given that the presumption interposes a "clear-statement rule" (*Lindh*, 117 S. Ct. at 2062) rebuttable only by clear "statutory language." *Id.* at 2064 n.4; see also, *e.g.*, *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (ruling that retroactive application of statutes is barred "unless *their language* requires this result") (emphasis added). The FCC also fails to explain how allowing legislative history—especially fleeting (and likely scripted) exchanges on the floor of a single house of Congress by a couple of Members, such as those cited by respondents—to provide the requisite authorization for retroactivity comports with the purpose of the presumption, which is to "ensure that *Congress itself* has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511 U.S. at 268 (emphasis added).[7]

Nevertheless, although unacknowledged by respondents, the fact is that the Circuits are very much divided on the question whether legislative history can be used to rebut the presumption against retroactivity. See generally *Hunter* v. *United States*, 101 F.3d 1565, 1569 (11th Cir. 1996) (citing cases constituting "conflict among the circuits, and even within some circuits, about whether *Landgraf*'s first step [*i.e.*, unambiguous congressional intent] can be satisfied by evidence of legislative intent other than in an express statutory command"). The court should grant certiorari here to resolve this acknowledged split.[8]

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[7] Contrary to the FCC (Opp. 16), there is a fundamental difference between citing legislative history as a basis for *adhering* to the presumption (which *Landgraf* did, *see* 514 U.S. at 262-63) and citing legislative history as a basis for *rebutting* the presumption (which this Court has *never* done). *See Lindh* v. *Murphy*, 117 S. Ct. 2059, 2064 n.4 (1997) ("[C]ases where this Court has found truly 'retroactive' effect adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one interpretation.").

[8] The FCC's reliance (Opp. 18) upon *Landgraf*'s reference to "commonsense" (511 U.S. at 275 n.29) is misplaced. That statement simply reflects the intuitive correctness of the rule that new procedural rules are presumptively not to be applied in cases where

c. Importantly, respondents limit themselves to erroneous merits arguments without addressing Northeast's arguments as to the importance of providing further guidance on the *Landgraf* issue. Specifically, respondents do not deny Northeast's showing (Pet. 23-25) that the Circuits are sharply divided on the proper analysis under *Landgraf* of procedural changes. Additionally, the FCC's "doubt[s]" as to whether *Landgraf* applies "to procedural changes in administrative [as opposed to judicial] proceedings" (Opp. 18 n.4) simply provide yet another reason for the Court to hear this important case.

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The petition for writ of certiorari should be granted.

Respectfully submitted,

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old procedures have already been applied. That is so because once that point in a particular proceeding has been reached, the parties *do* have "reliance interests in matters of procedure," and any attempt thereafter to apply a new and different procedural rule would be subject to the presumption against retroactivity. *Id.* at 275 & n.29. This is particularly so where, as here, the new procedural rule revives a claim that was previously dead in the particular litigation, as PortCell's twice-rejected PRA claim was here prior to 1995. *See Hughes Aircraft*, 117 S. Ct. at 1878 (holding that new statute lifting procedural obstacle that "completely barred" a claim is impermissibly retroactive).